(21,829.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 330.

DAVID MUSKRAT AND J. HENRY DICK, ON THEIR OWN BEHALF AND ON BEHALF OF ALL CHEROKEE CITIZENS ENROLLED AS SUCH FOR ALLOTMENT AS OF SEPTEMBER 1, 1902, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 2, 1910.

1

I. *Original Petition.*

Filed March 16, 1907.

In the Court of Claims.

No. 29986.

DAVID MUSKRAT and J. HENRY DICK, on Their Own Behalf and on Behalf of all Cherokee Citizens Enrolled as Such for Allotment as of September 1, 1902,

vs.

THE UNITED STATES.

To the Honorable the Chief Justice and the Associate Justices of the Court of Claims:

Your petitioners, David Muskrat and J. Henry Dick, are citizens of the United States and of the Cherokee Nation, resident in the Indian Territory, and they bring this suit in their own right, and on behalf of all those persons, members of the Cherokee tribe of Indians, enrolled as such for allotment as of September 1, 1902, numbering about 36,000—whose names appear on the citizenship roll made as of that date.

They respectfully state and show that—

I.

Your petitioners, and all those members of the Cherokee tribe of Indians who were not citizens of the United States prior to
2 March 3, 1901, became such on that day, by the terms of the act of Congress of that date, wherein it is provided that: "Every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." (31 Stat. L., 1447.)

II.

At the time of the passage of this Act, by which all Indians in the Indian Territory, not already citizens of the United States, became such, the Cherokee Indians, residing in said Territory, were communal owners of four and one-half million acres of land, more or less, with water rights of great value, of certain valuable leases to railroad, pipe line, telegraph and telephone companies, and other public service corporations; also, of valuable public buildings, school houses and town site property; also of the sum of more than

$2,900,000.00 then in the Treasury of the United States, to which fund large sums have since been, and others still are to be, added.

III.

By the act of July 1, 1902 (32 Stat. L., 716), entitled "An Act to Provide for the Allotment of the Lands of the Cherokee
3 Nation, for the Disposition of Town Sites Therein, and for Other Purposes," it was provided that a roll of citizens should be made as of September 1, 1902, by the Commission to the Five Civilized Tribes, which should contain the names of all persons then living who were entitled to enrollment as members of the Cherokee Tribe; that these names should be placed upon a roll of persons entitled "to participate in the distribution of the tribal property of the Cherokee Nation"; that no child born after said date, to a citizen of the Cherokee Nation, should be entitled to such enrollment or to participation in the distribution of the tribal property; and that the roll thus prepared, when approved by the Secretary of the Interior, should constitute the final roll of Cherokee citizens upon which the allotment of lands and distribution of other tribal property should be made.

It was further declared that this roll, approved by the Secretary of the Interior, should be deemed complete, and that no person whose name did not appear upon said roll should be entitled to participate in any manner in the allotment of the lands or distribution of funds of the Cherokee people.

The pertinent paragraphs of this act are as follows:

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day
4 of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the Act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

SEC. 28. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other tribe shall be enrolled as a citizen of the Cherokee Nation.

SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the

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said commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made.

When there shall have been submitted to and approved by
5 the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: Provided, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person

or persons who may conceal the death of anyone on said roll
6 as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

It was further provided by this act that the acceptance of a patent for an allotment by an allottee was to operate as a quit claim of the allottee's interest in all other allotments made under the provisions of the act.

Such provision is found in Section 60 of the act, which is as follows:

SEC. 60. Any allottee accepting such patent shall be deemed to

assent to the allotment and conveyance of all the lands of the tribe, as provided in this act, and to relinquish all right, title, and interest to the same except in the proceeds of lands reserved from allotment.

The act further provides that all the funds then belonging to the tribe and all other tribal moneys subsequently acquired should be paid to the individuals per capita, as nearly as practicable. Such provision is found in the following sections of the act:

SEC. 66. All funds of the tribe, and all moneys accruing
7 under the provisions of this act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior.

SEC. 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable, and he shall make all needed rules and regulations to carry this provision into effect.

It was further provided that if any person who was entitled to be so enrolled should die subsequent to September 1, 1902, and before receiving his said allotment, the lands which would have been allotted to said person, if living, should be allotted in his name and should, "with his proportionate share of other tribal property," descend to his heirs according to the laws of Arkansas. The provision of the statute on this subject is as follows:

SEC. 20. If any person whose name appears upon the roll pre-
pared as herein provided shall have died subsequent to the
8 first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

IV.

By the terms of the said act of July 1, 1902, it was provided that it should be submitted for ratification to the Cherokee people. It was so submitted, and, by a popular vote, on August 7, 1902, was rati-

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fied by the Cherokee people; and on August 12, 1902, was proclaimed by the authorized agent of the Government and the principal chief of the Cherokee Nation in the following form:

Whereas, an Act of Congress, entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of Town sites therein, and for other purposes," approved July 1, 1902, provides:

"The principal chief shall, within ten days after the passage of this act by Congress, make public proclamation that the same
9 shall be voted upon at a special election to be held for the purpose within thirty days thereafter, on a certain date therein named, and he shall appoint such officers and make such other provisions as may be necessary for holding such election. The votes cast at such election shall be forthwith duly certified as required by the Cherokee law, and the votes shall be counted by the Cherokee National Council, if then in session, if not in session the principal chief shall convene an extraordinary session for that purpose, in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief shall jointly make certificate thereof and make proclamation of the results, and transmit the same to the President of the United States."

And whereas, said principal chief did, within ten days after the passage of said act by Congress, make public proclamation that the same should be voted upon at a special election to be held on the 7th day of August, 1902, in the Cherokee Nation, Indian Territory;

And whereas, said special election was held on the 7th day of August, 1902, in said nation;

And whereas, the said Cherokee National Council convened in extraordinary session for the said purpose, and in the presence of a member of the Commission to the Five Civilized Tribes did, on the 12th day of August, 1902, count the votes cast at said election;

And whereas, the votes cast at said election were canvassed by the Cherokee National Council and the votes cast at said election show that the said act was ratified by a majority of nineteen hundred and sixty-four votes:

Now, therefore, we, Tams Bixby, a member of the Commission to the Five Civilized Tribes, and Thomas M. Buffington, principal chief of the Cherokee Nation, do hereby certify and proclaim that the said act of Congress entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," approved July 1, 1902, was by popular vote, at a special election held on the 7th day of
10 August, 1902, ratified by the legal voters of the Cherokee Nation by a majority of nineteen hundred and sixty-four votes.

Done at Tahlequah, Cherokee Nation, Indian Territory, on the 12th day of August, 1902.

(Signed) TAMS BIXBY,
Member of the Commission to the Five Civilized Tribes.
T. M. BUFFINGTON,
Principal Chief of the Cherokee Nation.

V.

Proceeding under the authority of said act, the Commission to the Five Civilized Tribes, upon the basis of an allotment of 110 acres of the average allottable lands, as provided by Sec. 11 of said act, fixed the then value of said average allotment at $325. The authority for such proceeding is found in the following sections of the act:

SEC. 9. The lands belonging to the Cherokee tribe of Indians in Indian Territory, except such as are herein reserved from allotment, shall be appraised at their true value: Provided, That in the determination of the value of such land consideration shall not be given to the location thereof, to any timber thereon, or to any mineral deposits contained therein, and shall be made without reference to improvements which may be located thereon.

SEC. 10. The appraisement, as herein provided, shall be made by the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior.

SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one
11 hundred and ten acres of the average allotable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

VI.

Under the several provisions of this act the Commission to the Five Civilized Tribes, acting under the direction of the Secretary of the Interior, has prepared a roll of Cherokee citizens for the allotment of lands and distribution of funds, which said roll contains the names of about 36,000 persons, enrolled for allotment as of Sept. 1, 1902.

By the said act of July 1, 1902, it was provided that no application for such enrollment should be received after October 31, 1902, as is shown by Section 30 of the act here set out:

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

The number of persons who would be entitled to enrollment for the purposes of allotment and distribution on July 1, 1902,
12 being unknown, it has resulted that after allotment to those persons now enrolled, in accordance with the provisions of said act of July 1, 1902, there are lands undisposed of sufficient to provide about 3,000 allotments of the present aggregate value of at least three million dollars.

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VII.

By the terms of said act of July 1, 1902, your petitioners and those on whose behalf they bring this suit, became vested, as individuals, with an indefeasible right, title and interest in and to all the property, real, personal and mixed, of the Cherokee tribe, in the Indian Territory, and were the sole and exclusive owners thereof; and they have agreed by the said act that only those persons duly enrolled thereunder and equally entitled, with them, to allotments, shall share likewise in the distribution of the national funds and other tribal property.

They and those on whose behalf this suit is brought are entitled to have and receive, share and share alike, the said surplus lands, or the proceeds thereof if sold, remaining after the allotments to the persons enrolled under the authority of said act, and likewise, all monies belonging to the Cherokee tribal fund, as well as all sums that may hereafter be added thereto.

But by the act of April 26, 1906, entitled "An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes," it was provided that applications should be received by the Commissioner to the Five Civilized Tribes for the enrollment of Cherokees who were
13 minors living on March 4, 1906, whose parents had been enrolled as members of the Cherokee and certain other tribes. Notwithstanding the inclusion of the minors of Cherokee parents, in the words of this act, it was provided, in the second section thereof, that such applications should not be received where the date for filing applications had been fixed by agreement between any tribe and the United States; and, the date for the termination of filing applications having been fixed as October 31, 1902, by the agreement between the United States and the Cherokees, the said provisions of said act of April 26, 1906, did not apply to the Cherokees. The provision of the said act is as follows:

SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by Act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for
14 equalizing allotments, are hereby restored and reenacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this Act as to allotments heretofore

made, no contest shall be instituted against such allotment: Provided, That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: Provided further, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: Provided, That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States.

But by the act of June 21, 1906 (34 Stat. L., 1908), this act was amended so as to repeal this particular provision and to make the said act of April 26, 1906, in this particular, applicable also to the Cherokees. The provision of the repealing act is as follows:

"That section two of the act entitled 'An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, be, and the same is hereby, amended by striking out thereof the words 'Provided further, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States.' "

It results that the act of April 26, 1906, as amended by the said act of June 21, 1906, deprives petitioners, and all others on whose behalf this suit is brought, of their vested property rights in and to the lands and funds and other tribal property of the Cherokee people, in violation of the constitutional provision that no person shall be deprived of his property without due process of law.

As provided by Section 2 of the said act of April 26, 1906, which, amended as shown by the said act of June 21, 1906, is now in force, if any citizen of the Cherokee tribe shall fail to receive the full quantity of lands therein provided for him as an allottee, he shall be paid out of any of the funds of the said tribe a sum equal to twice the appraised value of the amount of land thus deficient.

As hereinbefore charged, the lands remaining unallotted in the Cherokee Nation are sufficient for only about 3,000 allotments. There have been born to Cherokee citizens enrolled allotment as of September 1, 1902, since said date 5,961 children, who were living on March 4, 1906.

VIII.

Your petitioners here and now specifically charge that they, and all those persons on whose behalf this suit is brought, became, by the said act of July 1, 1902, vested individually with an absolute and indefeasible title in and to all the lands and funds and to all the tribal property of the said Cherokee people; and are entitled to share in all the same, to the exclusion of all persons not in existence on September 1, 1902, and not enrolled as of said date; and that if the said acts of April 26, 1906, and June 21,

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1906, be enforced, they will be deprived of such property as remains unallotted and undistributed under the terms of the original act, of July 1, 1902, without due process of law; and that said acts are therefore in violation of the said constitutional provisions, and null and void.

IX.

On January 23, 1907, your petitioners, together with Henry Eiffert, Levi Gritts, Nick Comingdeer and Johnson Manning, as co-plaintiffs, filed in the Supreme Court of the District of Columbia a bill in which substantially the foregoing allegations were made. They allege in said bill that the Secretary of the Interior and the Commissioner of Indian Affairs were about to put into force and effect the said provisions of the acts of April 26, 1906, and June 21, 1906, which violated the constitutional rights of your petitioners, and they prayed the issuance of writs of injunction against the Secretary of the Interior and the Commissioner of Indian Affairs, the prayer of said bill being in words and figures following, to-wit:

The premises considered, plaintiffs pray that copy, subpœna, and all proper process issue, making the said Ethan A. Hitchcock, as Secretary of the Interior, and the said Francis E. Leupp, as Com-
17 missioner of Indian Affairs, parties defendant hereto, and requiring them to appear and answer fully the exigencies of this bill; that a preliminary writ of injunction issue to said defendants, or a rule to show cause why such writ should not issue, enjoining and restraining them, and each of them, from proceeding or continuing to allot any of said lands to said minors born after September 1, 1902, or providing for the distribution of any of said funds to such minors; and requiring them, and each of them, to cancel all allotments and distributions, or provision therefor, heretofore by them, or either of them, made or approved; that said plaintiffs have a decree declaring said acts of April 26, 1906, and June 21, 1906, in the particulars hereinbefore set out, in violation of and repugnant to the Constitution of the United States, and null and void and of no effect as to the lands and funds formerly belonging to the Cherokee Nation; that such writ of injunction as shall issue, or such rule as shall proceed, from this court so restraining the defendants be made perpetual; that, upon final hearing the right, title, and interest of plaintiffs and of those in whose behalf this suit is brought be by suitable decree declared, and to that end that all necessary orders and decrees be entered and all proper process employed. Plaintiffs pray also for general relief.

But before a hearing on the applications for the writs of injunction could be had, a bill was introduced in Congress, providing the reference of this case to this Honorable Court. Your petitioners, desiring the judgment of this court, and seeking the speedier disposition
of the litigation which would be so accomplished, and the
18 Department of the Interior being likewise disposed, it was stipulated in said cause in the said Supreme Court of the District of Columbia that it should be continued and remain pending until Congress should determine whether or not the bill to refer the said cause to this court should be passed.

X.

By an item on the Indian Appropriation Bill entitled "An Act making appropriation for the Current and Contingent Expenses of the Indian Department and for fulfilling Treaty Stipulations for the Various Indian Tribes for the Fiscal Year ending June 30, 1908, and for Other Purposes" (Public No. 154. Approved March 1st, 1907), it was enacted—

"That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interest in the property allotted under the act of July 1, 1902, an act entitled 'An Act to provide for the allotment of lands to the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, be and they are hereby authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts in Congress passed since the said act of July 1, 1902, so far as the said acts, or any of them, attempt to increase or extend the restrictions upon alienations, incumbrance, or the right to lease the allotment of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final
19 distribution of lands and funds of the Cherokees, beyond those enrolled for allotment as of September 1, 1902, as provided for in the said act of July 1, 1902.

And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal by either party, to the Supreme Court of the United States, to hear, determine and adjudicate each of said suits.

The suits brought hereunder shall be brought on or before September 1, 1907, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to same by said courts, and by the Attorney General, who is hereby charged with the defence of said suits.

Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of said acts, authorized to be brought into question in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above named parties, in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury, belonging to the beneficiaries under the said act of July 1, 1902."

XI.

Your petitioners charge that they are the identical persons named in the said jurisdictional act as David Muskrat and J. Henry Dick, and that, under the authority of said act, they have the right to bring this suit for and on behalf of themselves and of all
20 Cherokee citizens enrolled as of September 1, 1902, in accordance with the provisions of the act of July 1, 1902.

Wherefore, the premises considered, your petitioners pray the judgment and decree of this Honorable Court, declaring and adjudging—

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1. That the rights of these petitioners and all other Cherokee citizens enrolled as such for allotment as of September 1, 1902, in their respective allotments of land and in the unallotted lands and undivided funds of the Cherokee Nation, became and were fixed and determined by the provisions of said act of July 1, 1902, and that the same could not be diminished in any manner whatsoever by any subsequent acts of Congress.

2. That the Acts of Congress of April 26, 1906, and June 21, 1906, in so far as they attempt to increase the number of persons entitled to share in the final distribution of the lands and funds of the Cherokee people in excess of those lawfully enrolled for allotment under the Act of July 1, 1902, and entitled to enrollment as of September 1, 1902, are unconstitutional, null and void.

3. That the 5,961 persons, who were enrolled under the provisions of said acts of April 26, 1906, and June 21, 1906, are not entitled, under the law, to be enrolled for participation in the lands and funds of the Cherokee people.

4. That the unallotted lands of the Cherokee people, or the proceeds thereof if sold, and the proceeds of all public buildings, and other realty belonging to said Cherokees, which has not been allotted, including valuable water rights; the funds held in the Treasury of the United States, amounting to nearly $3,000,000 be-
21 longing to the Cherokee people, all funds arising from the sale of town sites, from leases to individuals, to railroads, pipe lines, telephone lines, and other corporate bodies, and the proceeds of the sale of rights of way to these corporations, or to other corporations or individuals, together with all other funds belonging to the Cherokee people, or arising from the sale of Cherokee property, are, by law, distributable, per capita, among those Cherokee citizens who have been enrolled as of September 1, 1902.

Your petitioners further pray the judgment and decree of this Honorable Court, declaring and adjudging the said acts of April 26, 1906, and June 21, 1906, in the particulars hereinbefore set out, to be in violation of, and repugnant to, the Constitution of the United States, and null and void, and of no effect as to lands and funds belonging to the Cherokee people on July 1, 1902, and as to the rights of your petitioners and all persons on whose behalf this suit is brought in and to said lands, funds and other said tribal property.

And they pray also for such other and further decrees as shall be within the jurisdiction of this Honorable Court under the act hereinbefore set out, and for general relief.

DAVID MUSKRAT.
J. HENRY DICK.

WM. H. ROBESON,
DANIEL B. HENDERSON,
JOHN J. HEMPHILL,
FRANK J. BOUDINOT,
Attorneys for Petitioners.

22 DISTRICT OF COLUMBIA, *ss:*

This day personally appeared before me, J. Henry Dick, who being first sworn, deposes and says, I am one of the petitioners in the foregoing petition; I have carefully read the statements thereof; they are true to the best of my knowledge, information and belief.

J. HENRY DICK.

Subscribed and sworn to before me this 4th day of March, 1907
JENNIE M. SHEFFER,
Notary Public in and for the District of Columbia.

23 II. *Traverse.*

Filed November 18, 1908.

In the Court of Claims of the United States, December Term, A. D. 1908.

No. 29986.

DAVID MUSKRAT and J. HENRY DICK et al.
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.
JOHN Q. THOMPSON,
Assistant Attorney General.

24 III. *Intervening Petition of the Cherokee Nation.*

Filed be Leave of Court March 3, 1908.

In the Court of Claims of the United States.

No. 29986.

DAVID MUSKRAT and J. HENRY DICK
v.
THE UNITED STATES.

Intervening Petition of the Cherokee Nation.

To the Honorable Chief Justice and Associates Justices of the Court of Claims of the United States:

The Cherokee Nation by its principal chief, William C. Rogers, represented by its attorney in fact, William W. Hastings, respectfully shows to this court:

1. As the representative and having in its charge the interests of the Cherokee people entitled to participate in the distribution of the estate belonging to them, it is directly interested in this cause.

2. The Cherokee Nation of Indians is and at all times has been a body politic and recognized as such by the United States.

3. That under and by virtue of the provisions of certain acts of Congress and of the treaties between the United States and the Cherokee Nation of Indians, and the patent of the United States to the Cherokee Nation issued on the 31st day of December, 1838, as supplemented and interpreted by the treaty between the
25 same parties on August 17, 1846, the people of the Cherokee Nation of Indians became the owners of the lands embraced within the limits of the Cherokee Nation, formerly Indian Territory, now Oklahoma, and are possessed of and now own all of said lands that have not been allotted to individual allottees.

4. That said Cherokee Nation as a body politic possessed and under the provisions of the treaties aforesaid was granted the right of local self-government with full authority to make and carry into

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effect all such laws as it might deem necessary for the government and protection of persons and property within its jurisdiction, belonging to its own people or such persons who might be associated or connected with them.

5. In the exercise of this governmental power the people of the Cherokee Nation ordained and established a written constitution and system or code of laws.

6. That by an act of Congress approved March 3, 1893 (27 Stat. L., 645), a Commission, hereafter known as the Commission to the Five Civilized Tribes, was appointed to negotiate agreements with the Five Civilized Tribes, including the Cherokee Nation, for the allotment of the lands in severalty of the Cherokee Nation, and the authority of the Commission appointed under said act was continued from year to year by acts of Congress.

7. On June 10, 1896, Congress by an act (29 Stat. L., 321) conferred the additional authority upon the Commission referred to in the sixth paragraph hereof to hear and determine the applica-
26 tions of all persons for admission to citizenship in the Cherokee Nation with the right of appeal to both the applicant and the Cherokee Nation to the United States court in the Indian Territory, now Oklahoma, and by the act of July 1, 1898 (30 Stat. L., 591), it was provided that an appeal might be taken by either party to the Supreme Court of the United States.

8. By an act approved June 28, 1898 (30 Stat. L., 495), Congress authorized and directed the Commission to the Five Civilized Tribes, with the approval of the Secretary of the Interior, to make a final roll of all persons entitled to be enrolled as citizens of the Cherokee Nation, with instructions in section 21 of said act as to how said roll should be made; and said Commission was further instructed by the act of May 31, 1900 (31 Stat. L., 221), not to receive, consider, or make any record of the application of any person whomsoever who had not been a recognized citizen of the nation and duly and lawfully enrolled and admitted as such.

9. On May 11, 1900, the Commission to the Five Civilized Tribes began making the roll of citizens of the Cherokee Nation under the act of Congress approved June 28, 1898 (30 Stat. L., 495), and was engaged in the making of said roll when the acts of May 31, 1900 (31 Stat. L., 221); March 3, 1901 (31 Stat. L., 1073); July 1, 1902 (32 Stat. L., 716); April 26, 1906 (34 Stat. L., 137), and June 21, 1906 (34 Stat., L., 324), were passed.

27 10. By an act of Congress approved March 3, 1901 (31 Stat. L., 1073), the Secretary of the Interior was authorized and directed to fix a time by agreement with the Cherokee Nation for closing the roll which was being made by the Commission to the Five Civilized Tribes under the acts of June 28, 1898, and May 31, 1900, and upon failure or refusal of the Cherokee Nation to enter into an agreement with the Secretary of the Interior fixing the time for the closing of said roll, the Secretary of the Interior was authorized to fix the time for the closing of said roll, after which no name should be added thereto, and the Secretary, having failed to make an agreement with the Cherokee Nation fixing a date for the closing of said roll, on January 15, 1902, fixed the date for the closing of said roll on July 1, 1902.

11. Section 25 of the act of Congress approved July 1, 1902 (32 Stat. L., 716), extended the time for the closing of the Cherokee roll until September 1, 1902, and section 29 of said act directed the Commission to the Five Civilized Tribes from time to time to forward to the Secretary of the Interior lists of the names of persons found entitled to enrollment, and in compliance with said provision lists were forwarded to the Secretary containing the names of persons found entitled to be enrolled as citizens of the Cherokee Nation for the approval of the Secretary of the Interior, which were, as amended and corrected, approved up to and including March 4, 1907.

28 12. That section 3, Article XI, of the constitution of the Cherokee Nation provides:

When the national council shall determine expediency of appointing delegates or other public agents for the purpose of transacting business with the Government of the United States, the principal chief shall recommend and, by and with the advice and consent of the national committee, appoint and commission such delegates or public agents accordingly. On all matters of interest touching the rights of the citizens of this Nation which may require the attention of the United States Government the principal chief shall keep up a friendly correspondence with that Government through the medium of its proper officers.

And under section 1 of amendments to Article III, of the said constitution, adopted November 26, 1866, the name of the upper branch of the Cherokee national council was changed from "national committee" to "senate."

13. On September 28, 1905, the Cherokee national council passed an act, which was approved by the President of the United States, entitled "An act providing for a commission to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs," which is in words and figures as follows, to wit:

Whereas under existing laws the tribal government of Cherokee Nation ceases on the fourth day of March, 1906, and,

29 Whereas many vital and important questions affecting the educational, financial, and property interests of the Cherokee Nation and its people, remain open and unprovided for by existing laws and treaties, and,

Whereas those in whom this vast estate is vested and whose rights are involved, the Cherokee people, ought to be consulted and have a right to be heard in that behalf, therefore, be it enacted by the National Council of the Cherokee Nation:

SECTION 1. That the principal chief be and he is hereby authorized and directed to appoint a commission, consisting of three persons, by and with the consent of the senate, who shall be authorized to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs and of our relations with the United States of America, except as to all matters now pending in the courts of the United States. Be it further enacted:

SEC. 2. That each member of said commission shall receive the sum of fifteen dollars per diem while employed upon the duties of their appointment as hereinafter provided, which sum shall be taken and accepted by the said commissioners in full payment for their per diem and all expenses: *Provided, however*, That the sum paid

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each commissioner shall not exceed the sum of one thousand dollars, and the sum of three thousand dollars be, and the same is hereby, appropriated out of the general fund of the Cherokee Nation, or so much thereof as may be necessary, to carry into effect
30 the provisions of this section, and a further sum of two hundred dollars be, and the same is hereby, appropriated out of the same fund, or so much thereof as may be necessary, to pay for stationery, stenographic service, and printing, and all moneys appropriated under this act must be drawn by warrants by the principal chief, through requisitions made to him by the chairman of the said commission, accompanied by vouchers duly certified.

Be it further enacted:

SEC. 3. That the services of said commission shall only begin when they are called together by the principal chief or the Secretary of the Interior, and their services may be discontinued by the principal chief of the Cherokee Nation or the Secretary of the Interior.

Be it further enacted:

SEC. 4. That the principal chief, or in the event of a written statement by him of his inability to attend at any time, the assistant chief, is hereby authorized to attend upon said commission as an ex officio member thereof, without compensation other than the salary already provided by law for such officers, respectively, except said principal chief, or assistant chief, as the case may be, who may be actually engaged with said commission, shall receive his actual and necessary personal and traveling expenses while so engaged outside the Cherokee Nation, to be shown by itemized accounts in duplicate, accompanied by vouchers; and a sufficient sum is
31 hereby appropriated out of the general fund not otherwise appropriated, to pay the same.

Be it further enacted:

SEC. 5. It is hereby made the duty of the national attorney of the Cherokee Nation to accompany said commission and advise them upon matters of law, and assist them in the work, without additional expense to the Cherokee Nation.

And as provided in said act the following members of the Cherokee commission were appointed: W. W. Hastings, E. L. Cookson, and Fred. McDaniel.

14. On September 29 the Cherokee commission, composed of W. W. Hastings, E. L. Cookson, and Fred. McDaniel, by a joint resolution of the national council of the Cherokee Nation, was instructed as follows:

Resolved, It is the sense of the national council of the Cherokee Nation, representing the Cherokee people, that a final settlement of our affairs should be made:

First. For the participation of all children born since September 1, 1902, and prior to March 4, 1906, who but for the limitation contained in section 25 of the act of Congress of July 1, 1902, would be entitled to share equally with children born prior thereto, and that said participation should, if possible, be equal in every respect in the lands and moneys as provided by said act of Congress; if this cannot be, then a sum of money should be given to each of said children as will equal so far as possible the share which has been given others under said act.

32 Second. For the sale of surplus lands, public property, buildings, and grounds upon the very best terms possible and the distribution of our moneys per capita among those entitled thereto when the same shall have been collected, and our obligations satisfied, or provisions made therefor.

Third. For continuing the primary schools, seminaries, insane asylum, and orphanage at the expense of the Cherokee Nation until such time as by taxation or otherwise a general school system is established by another government in the Cherokee Nation; that it would be double taxation, unfair and unjust to the Cherokee people, to retain a portion of their funds for the maintenance of schools beyond the time when a general or public school system is provided for all inhabitants of said nation alike.

Be it further resolved, That the commission heretofore authorized by act of the national council are requested to use their best efforts to secure the favorable action of Congress upon the matters referred to in this resolution.

15. That said Cherokee commission, accompanied by W. C. Rogers, Principal Chief of the Cherokee Nation and ex officio a member of said commission, and by Luman F. Parker, jr., national attorney of the Cherokee Nation, came on to Washington on November 21, 1905, and conferred with the representatives of the Interior Department, the Commissioner of Indian Affairs, and the House and Senate Committees on Indian Affairs, and at the request and

33 recommendation of said Cherokee commission, as instructed by the Cherokee national council, section 2 of the act of April 26, 1906 (34 Stat. L., 137), as amended by act of June 21, 1906 (34 Stat. L., 325), providing for the enrollment of minor children living March 4, 1906, born of recognized and enrolled parents in the Cherokee Nation, or who had applications pending for enrollment as citizens of the Cherokee Nation, with the same property rights as other recognized and enrolled citizens of the Cherokee Nation, was incorporated into the act of April 26, 1906.

16. That section 2 of amendments to article 1 of the constitution of the Cherokee Nation provides:

The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same in accordance with the provisions of article 20 of the treaty of 19th of July, 1866, between the United States and the Cherokee Nation.

And said section 20 of the treaty of 19th of July, 1866, provides as follows:

Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States.

17. That said section 2 of the act of April 26, 1906 (34 Stat. L., 137), also provided "that the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, 1907, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date."

34 18. That lists containing the names of all minor children enrolled under section 2 of the act of April 26, 1906, as

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amended by the act of June 21, 1906, were approved by the Secretary of the Interior and said minor children were finally enrolled on or before March 4, 1907, and not thereafter.

19. That upon the date of the approval of the act of April 26, 1906 (34 Stat. L., 137), there was then and is now a large part of the lands of the Cherokee Nation unallotted, and there is enough land and moneys belonging to the Cherokee Nation to equalize, as provided in said act, the allotments of all persons whose names are upon the final roll approved by the Secretary of the Interior as citizens of the Cherokee Nation.

20. That the tribal existence of the Cherokee Nation was extended by joint resolution of the Congress of the United States approved March 2, 1906, as follows:

That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law.

And the tribal government of the Cherokee Nation was also continued by section 28 of the act of April 26, 1906 (34 Stat. L.,
35 137), until otherwise provided by law, and no other law has been subsequently enacted providing for the dissolution of the tribal government of the Cherokee Nation.

21. That in accordance with section 28 of the act of April 26, 1906 (34 Stat. L., 137), W. C. Rogers, the duly elected, recognized, and acting principal chief of the Cherokee Nation has employed William W. Hastings as attorney for the Cherokee Nation by contract, which contract was approved by the President of the United States, as provided in said section 28, on March 29, 1907, and expires March 4, 1908, and among other things said contract provides that the said William W. Hastings shall represent the Cherokee Nation in all cases in which it is interested before the Court of Claims, when the interests of the Cherokee Nation require it, or when directed by the principal chief.

22. That the Cherokee Nation is the party directly interested in the determination of this suit and the United States is only nominally interested therein, and the Cherokee Nation desires the constitutionality of section two of the act of April 26, 1906, as amended by the act of June 21, 1906, sustained by the court and all of the said minor children born to recognized and enrolled parents living on March 4, 1906, to remain upon the final roll as citizens of the Cherokee Nation, with equal rights in the division of lands and moneys belonging to the Cherokee Nation as all other enrolled citizens.

Wherefore your petitioner prays the court: First, that the
36 Cherokee Nation may be allowed to intervene in said case and made party defendant for the reasons hereinabove assigned; and second, that the minor children enrolled as citizens of the Cherokee Nation under the act of April 26, 1906, as amended

by the act of June 21, 1906, may be allowed to remain upon the final rolls of the Cherokee Nation and participate in the allotment of Cherokee lands and the distribution of Cherokee tribal funds in the same manner and to the same extent as Cherokee citizens enrolled under the acts of June 28, 1898 (30 Stat. L., 495), May 31, 1900 (31 Stat. L., 221), March 3, 1901 (31 Stat. L., 1073), and July 1, 1902 (32 Stat. L., 716).

WILLIAM W. HASTINGS,
Attorney in Fact for the Cherokee Nation.

DISTRICT OF COLUMBIA, *ss:*

Before me, the subscriber, a notary public in and for the District of Columbia, personally appeared William W. Hastings, and made oath in due form of law that the matters and things contained in the foregoing petition are true as herein set forth, to the best of his knowledge and belief.

Witness my hand and notarial seal this 27th day of February, 1908.

[SEAL.] L. E. KIDWELL,
Notary Public.

Filed February 29, 1908. Allowed by the court March 3, 1908.

37 IV. *Objection of Petitioners to Appearance of Cherokee Nation.*

Filed Nov. 18, 1908.

Objection is made by the petitioners in this case, to the appearance of the Cherokee Nation, as sought to be effected by its intervening petition, for the following reasons, to-wit:

1. The act provides that the United States alone shall be made a party defendant to the suit.

2. No complaint whatever is made by the petitioners against the Cherokee Nation, and no recovery sought against it.

3. Whatever judgment may be rendered by this court cannot affect the Cherokee Nation.

4. The case involves only the validity of certain enactments of Congress.

5. There is no such body as the Cherokee Nation and was not at the time of the filing of the petition.

WM. H. ROBESON,
DAN'L B. HENDERSON,
JOHN J. HEMPHILL,
Attorneys.

38 V. *Argument and Submission of Case.*

On November 18, 1908 Mr. William H. Robeson was heard in opposition to the right of the Cherokee Nation to appear and be heard in this case and Mr. William W. Hastings in support of it. Mr. Daniel B. Henderson was heard for the claimants.

On November 19, 1908 Mr. Hastings was heard for the Cherokee Nation and Mr. Robeson was heard for the claimants.

On November 24, 1908 Mr. Robeson was heard further and the case was submitted.

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VI. *Findings of Fact and Conclusions of Law and Opinion of the Court.*

Filed January 4, 1909.

This case coming on to be heard on the petition of David Muskrat and J. Henry Dick, on their own behalf and on behalf of all Cherokee citizens enrolled for allotment as of September 1, 1902, and on the intervening petition of the Cherokee Nation, by its principal chief, William C. Rogers, the court, upon the evidence adduced and after considering the argument and briefs of counsel on both sides, makes the following

FINDINGS OF FACT:

I.

The Cherokee Nation of Indians is a body politic, recognized as such by the United States, with a written constitution and system or code of laws and the right of local self-government granted under the provisions of treaties made with the United States and with full authority to make and carry into effect all such laws deemed necessary for the government and protection of persons and property within its jurisdiction, subject only to the paramount authority of the United States (117 U. S., 288; 187 Ibid., 294; 193 Ibid., 127), and the limitations imposed by existing laws.

II.

By an act of Congress approved March 3, 1893 (27 Stat., 645), a commission, afterwards designated as the Commission to the Five Civilized Tribes, was appointed to negotiate agreements with the Five Civilized Tribes, including the Cherokee Nation, for the allotment of the lands in severalty of the Cherokee Nation, and the authority of said commission appointed under said act was continued from year to year by subsequent acts of Congress.

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III.

By the act of June 10, 1896 (29 Stat. L., 321), additional authority was conferred upon said commission to hear and determine applications of persons for admission to citizenship in the Cherokee Nation, with the right of appeal both to the applicants and the Cherokee Nation to the United States court in the Indian Territory, now Oklahoma, and by the act of July 1, 1898 (30 Stat. L., 591), an appeal was provided for either party to the Supreme Court of the United States (174 U. S., 445).

IV.

By the act June 28, 1898 (30 Stat. L., 495), said commission was authorized to make, with the approval of the Secretary of the Interior, a final roll of persons entitled to be enrolled as citizens of the Cherokee Nation. Said commission was further instructed by the act May 31, 1900 (31 Stat. L., 221), not to receive, consider, or make any record of the application of any person whomsoever who had not been a recognized citizen of the Cherokee Nation and duly and lawfully enrolled and admitted as such.

V.

By the act March 3, 1901 (31 Stat. L., 1447), amending section 6, act February 8, 1887 (24 Stat. L., 390), it was provided: "Every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

VI.

On May 11, 1900, the Commission to the Five Civilized Tribes began making a roll of citizens of the Cherokee Nation under the act of Congress approved June 28, 1898 (30 Stat., 495), and was engaged in the making of said roll when the acts of May 31, 1900 (31 Stat., 221), March 3, 1901 (31 Stat., 1073), July 1, 1902 (32 Stat., 716), April 26, 1906 (34 Stat., 137), and June 21, 1906 (34 Stat., 325), were passed. Under the act of March 3, 1901 (31 Stat. L., 1077), the Secretary of the Interior fixed the time for closing the roll as of date July 1, 1902.

VII.

By the act July 1, 1902 (32 Stat. L., 716), section 25 thereof provided that the roll of citizens of said Cherokee Nation should be made as of September 1, 1902. In accordance with the express terms of said act it was submitted for ratification to the Cherokee people by popular vote, and on August 7, 1902, said act was ratified by a majority of 1,964 votes, which ratification was, as provided by said act, certified August 12, 1902, by one of the commissioners to the said civilized tribes and the principal chief of the Cherokee Nation to the President of the United States.

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After the passage of said act the date as of which said roll should be made was changed from July 1, 1902, to September 1, 1902, to conform to said act.

As provided in section 29 of said act, said commissioners from time to time forwarded lists containing the names of persons entitled to be enrolled to the Secretary of the Interior, which were, as corrected and amended, approved by him. The roll so made contains the names of 37,561 persons enrolled for allotment of lands and for the distribution of funds.

By said act of 1902 it was also provided that no child born after said date to a citizen of the Cherokee Nation should be entitled to such allotment or participation in the tribal property; that the roll when so made and approved should be final, upon which the allotment of lands and the distribution of other tribal property should be made.

VIII.

At the time of the passage of said act, July 1, 1902, the members of said tribe residing in said Territory were the communal owners under treaties, among other things, of about four and a half million acres of land, with water rights, leases to railroads, pipe lines, telegraph and telephone companies, and other public-service corporations; also of valuable public buildings, schoolhouses, and town-site property, and also of a large sum in the Treasury of the United States, which still remains in the Treasury, and to which other sums have been added and still others are to be added, exceeding $2,000,000.

Proceeding under the authority of said act, the Commission to the Five Civilized Tribes, upon the basis of an allotment of 110 acres of the average allottable lands, as provided by section 11 of said act, fixed the then value of said average allotment at $325.60.

After the allotment to those entitled under the provisions of said act July 1, 1902, upon the basis aforesaid, there yet remain sufficient lands to provide about 3,800 allotments of the present aggregate value of about $2,500,000. None of the funds in the United States Treasury to the credit of the Cherokee Nation have been distributed.

IX.

By section 2, act of April 26, 1906, as amended by the act June 21, 1906 (34 Stat. L., 137 and 341)—making said act applicable to Cherokees—the time for the completion of the roll so made under the act July 1, 1902, and prior acts, was extended or supplemented by permitting the enrollment of children who were minors living on March 4, 1906, whose parents had theretofore been enrolled as members of the Cherokee tribe or had applications pending therefor at the date of the approval of said act.

Under said acts minor children of enrolled Cherokee parents born after September 1, 1902, and living on March 4, 1906, to the number of 5,610 were enrolled on separate lists as other Cherokee citizens had been under the act of July 1, 1902, and which were, after correction and amendment, approved by the Secretary of the Interior on or

before March 4, 1907, as provided by said act of April 26 as amended by the act of June 21, 1906; and there remain enough unallotted lands and undistributed funds in the Treasury of the United States belonging to said Cherokee Nation to equalize the allotments of all Cherokee citizens whose names are upon the roll last approved by the Secretary of the Interior under said acts of April 26 and June 21, 1906.

X.

The petitioners and other persons named as complainants heretofore, to wit, on January 23, 1907, filed a bill in the supreme court of the District of Columbia, containing substantially the allegations which are embodied in the petition herein, and sought the issuance of writs of injunction against the Secretary of the Interior to prevent the allotment of lands and the distribution of funds in accordance with the act of April 26, 1906 (supra), as amended by the act of June 21, 1906 (supra). But before a hearing on the applications for writs of injunction was had, an act was passed by Congress referring the issues presented in that case to this court. Said jurisdictional act is a part of the Indian appropriation bill, entitled "An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with the various Indian tribes for the fiscal year ending June 30, 1908, and for other purposes," Public No. 154, approved March 1, 1907, and is in the following words: "That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interest in the property allotted under the act of July 1, 1902, an act entitled 'An act to provide for the allotment of lands to the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' and David Muskrat and J. Henry Dick, on their own behalf and on behalf of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts in Congress passed since the said act of July 1, 1902, so far as the said acts, or any of them, attempt to increase or extend the restrictions upon alienations, incumbrance, or the right to lease the allotment of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees, beyond those enrolled for allotment as of September 1, 1902, as provided for in the said act of July 1, 1902.

"And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal by either party to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

"The suits brought hereunder shall be brought on or before September 1, 1907, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.

"Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of said acts authorized to be brought into question in either or both of said cases, the Court of Claims shall determine the amount

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to be paid the attorneys employed by the above-named parties in the prosecution thereof for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July 1, 1902."

XI.

On September 28, 1905, the Cherokee national council, in conformity with section 3, article 6, of the constitution of the Cherokee Nation, passed an act, which was approved November 7, 1905, by the President of the United States, entitled "An act providing for a commission to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs," the pertinent parts of which were in words and figures as follows, to wit:

"Whereas under existing laws the tribal government of the Cherokee Nation ceases on the fourth day of March, nineteen hundred and six; and

"Whereas many vital and important questions affecting the educational, financial, and property interests of the Cherokee Nation and its people remain open and unprovided for by existing laws and treaties; and

"Whereas those in whom this vast estate is vested and whose rights are involved, the Cherokee people, ought to be consulted and have a right to be heard in that behalf: Therefore

"*Be it enacted by the national council of the Cherokee Nation:* SECTION 1. That the principal chief be, and he is hereby, authorized and directed to appoint a commission, consisting of three persons, by and with the consent of the Senate, who shall be authorized to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs and of our relations with the United States of America, except as to all matters now pending in the courts of the United States.

* * * * * * *

"*Be it further enacted:* SEC. 4. That the principal chief or, in the event of a written statement by him of his inability to attend at any time, the assistant chief is hereby authorized to attend upon said commission as an ex officio member thereof, without compensation other than the salary already provided by law for such officers, respectively, except said principal chief or assistant chief, as the case may be, who may be actually engaged with said commission, shall receive his actual and necessary personal and traveling expenses while so engaged outside the Cherokee Nation, to be shown by itemized accounts in duplicate, accompanied by vouchers; and a sufficient sum is hereby appropriated, out of the general fund not otherwise appropriated, to pay the same.

"*Be it further enacted:* SEC. 5. It is hereby made the duty of the national attorney of the Cherokee Nation to accompany said commission and advise them upon matters of law, and assist them in the work without additional expense to the Cherokee Nation."

And as provided in said act the following members of the Cherokee commission were appointed: W. W. Hastings, E. L. Cookson, and Fred McDaniel.

XII.

On September 29, 1905, the Cherokee commission, composed of W. W. Hastings, E. L. Cookson, and Fred McDaniel, by a joint resolution of the national council of the Cherokee Nation was instructed as follows:

"*Resolved*, It is the sense of the national council of the Cherokee Nation, representing the Cherokee people, that a final settlement of our affairs should be made:

"First. For the participation of all children born since September first, nineteen hundred and two, and prior to March fourth, nineteen hundred and six, who but for the limitation contained in section twenty-five of the act of Congress of July first, nineteen hundred and two, would be entitled to share equally with children born prior thereto, and that said participation should, if possible, be equal in every respect in the lands and moneys as provided by said act of Congress. If this can not be, then a sum of money should be given to each of said children as will equal so far as possible the share which has been given others under said act.

"Second. For the sale of surplus lands, public property, buildings, and grounds upon the very best terms possible, and the distribution of our moneys per capita among those entitled thereto when the same shall have been collected and our obligations satisfied, or provisions made therefor.

"Third. For continuing the primary schools, seminaries, insane asylum, and orphanage at the expense of the Cherokee Nation until such time as by taxation or otherwise a general school system is established by another government in the Cherokee Nation; that it would be double taxation, unfair and unjust to the Cherokee people, to retain a portion of their funds for the maintenance of schools beyond the time when a general or public school system is provided for all inhabitants of said nation alike.

"*Be it further resolved*, That the commission heretofore authorized by act of the national council are requested to use their best efforts to secure the favorable action of Congress upon the matters referred to in this resolution." After the commencement of the suit herein, to wit, August 17, 1907, said resolutions were approved by the President of the United States.

XIII.

The Cherokee commission, accompanied by W. C. Rogers, principal chief of the Cherokee Nation and ex officio member of said commission, and by Luman F. Parker, jr., national attorney of the Cherokee Nation, came on to Washington on November 21, 1905, and conferred with the representatives of the Interior Department, the Commissioner of Indian Affairs, and the House and Senate Committees on Indian Affairs, and at the request and recommendation of said Cherokee commission, as instructed by the Cherokee national council, section 2 of the act of April 26, 1906 (34 Stat., 137), providing for the enrollment of minor children living on March 4, 1906, born of recognized and enrolled parents in the Cherokee Nation with the same property rights as other recognized and enrolled citizens of the Cherokee Nation, was incorporated into the act of April 26, 1906, and amended by the act of June 21, 1906 (32 Stat., 325).

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XIV.

Section 2 of amendments to article 1 of the constitution of the Cherokee Nation provides:

"The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same in accordance with the provisions of article twenty of the treaty of nineteenth of July, eighteen hundred and sixty-six, between the United States and the CherokeeNation."

And said section 20 of the treaty of 19th of July, 1866 (14 Stat., 799), provides as follows:

"Whenever the Cherokee national council shall request it the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and alloted among them at the expense of the United States."

XV.

By section 63, act July 1, 1902, *supra*, it was provided that "the tribal government of the Cherokee Nation shall not continue longer than March 4, 1906." But by joint resolution of Congress approved March 2, 1906 (34 Stat., 822), it was extended as follows:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law."

And the tribal government of the Cherokee Nation was thereafter continued by section 28 of the act of April 26, 1906 (34 Stat., 137), "until otherwise provided by law," and no other law has been subsequently enacted providing for the dissolution of the tribal government of the Cherokee Nation. The allottable lands and funds remaining after the allotments among those enrolled under the act of July 1, 1902, were allotted and distribution provided for to those enrolled under said act of April 26, as amended by the act of June 21, 1906. Said allotments are treated by the Interior Department "as tentative allotments," their finality depending upon the construction of said acts of April and June, 1906.

CONCLUSIONS OF LAW.

Upon the foregoing findings of fact the court decides, as conclusions of law, that—

1. The petitioners and all other members of the Cherokee Nation of Indians were citizens of the United States on July 1, 1902, the date of the passage of the act of that date, as were their children thereafter born as set forth in finding V.

2. The Cherokee Nation is and always has been recognized by the United States as a distinct political community, subject only to the paramount authority of the United States.

3. The tribal existence and present tribal government of said Cherokee Nation were existing at the date of the passage of the acts April 26 and June 21, 1906, as set forth in finding XV.

4. No citizen of the Cherokee Nation has any vested interest in the unallotted lands of said nation or in the undistributed funds in the Treasury of the United States to the credit of said nation or tribe.

5. Section 2 of the act April 26, as amended by the act June 21, 1906, was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation, as instructed by the national council of the Cherokee Nation, with the approval of the President of the United States, as set forth in findings XI, XII, and XIII.

6. The Congress have plenary power to guard, protect, and administer upon the tribal property of the Cherokee Nation, and that power is political, and is for the legislative branch and not for the courts to determine.

7. The provisions of the act April 26, as amended by said act of June 21, 1906, authorizing the enrollment of minor children born after September 1, 1902, and living on March 4, 1906, is a valid constitutional statute, and the minor children so enrolled, as therein provided and set forth in the findings herein, are entitled to remain upon the final Cherokee roll for the purpose of participating in the allotment of the Cherokee lands and in the distribution of the Cherokee tribal funds in the same manner and to the same extent as Cherokee citizens enrolled under the acts June 28, 1898 (30 Stat. L., 495), May 31, 1900 (31 Ibid., 221), and July 1, 1902 (32 Ibid., 716).

8. The petition is therefore dismissed and judgment ordered for the defendants.

OPINION.

PEELLE, CH. J., delivered the opinion of the court:

By a provision in the Indian appropriation act March 1, 1907 (34 Stat. L., 1015, 1028), set out in finding X, jurisdiction was conferred upon the court, with the right of appeal, "to determine the validity" of certain acts of Congress passed since July 1, 1902, respecting the rights, privileges, and immunities of Cherokee Indians, citizens of the United States, in and to the common property of the Cherokee Nation on September 1, 1902, the date fixed by the act of July 1, 1902 (32 Stat. L., 716), for the allotment of their lands, which date of allotment was, by the act of April 26, 1906, as amended by the act of June 21, 1906—to apply to Cherokee Indians—extended to March 4, 1906 (34 Stat. L., 137 and 341). Herein lies the controversy.

The court, on application therefor, over the objections of the claimants, permitted the Cherokee Nation, through its principal chief, to file its intervening petition, and its national attorney to participate in the argument.

The validity of the statutes involved might perhaps have been determined on demurrer had the defendants so elected; but they, deeming the action of the Cherokee council providing for the appointment of three commissioners to secure legislation by Congress providing for the enrollment of children born of enrolled Cherokee parents after September 1, 1902, essential, tendered the general issue, and accordingly both parties have asked the court to make findings of fact, which we have done, though the findings are mainly deductions from statutes and treaties, and may not be deemed necessary by the Supreme Court, in case of appeal, to determine the validity of the acts in question.

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By virtue of the act March 3, 1901 (31 Stat. L., 1447), amending section 6 act February 8, 1887 (24 Stat. L., 390), the Cherokees and other Indians in the Indian Territory were made citizens of the United States "without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The act of July 1, 1902, in compliance with its terms (sections 74 and 75), was submitted to the Cherokee people for ratification by popular vote, and was so ratified August 7, 1902, and, as in said act provided, was duly certified to the President of the United States August 12, 1902. The claimants, as well as the defendants and Cherokee Nation, intervenor, concede the validity of said act, although by virtue of the Indian appropriation act of March 3, 1901 (31 Stat. L., 1073), the Secretary of the Interior was authorized to and did fix the time for the enrollment as of July 1, 1902, which date was extended by said act of July 1, 1902, to September 1, 1902.

The court deems it unnecessary to consider in detail the manner and method of the appraisement of the lands and the making of the roll upon which the allotments were made or the various acts of Congress passed prior to July 1, 1902, respecting the creation and authority of the Commission to the Five Civilized Tribes, diminishing the tribal power and subjecting the legislation of the nation to the approval of the President of the United States, except so far as they show the purpose of Congress in dealing with the tribal government as well as with the tribal property of the Cherokee Nation. It is enough to say that the allotment under the act of July 1, 1902, with the consent of the Cherokee people, was authorized, a roll was made of all Cherokee citizens as of September 1, 1902, and approved by the Secretary of the Interior, under which roll allotments to each individual were made as provided by section 11 of the act of "lands equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation," the value of which land, in the manner provided by section 9 of the act, was fixed at $325.60.

After said allotments had been made there remained unallotted lands sufficient for about 3,800 such average allotments, which unallotted lands, together with the undistributed funds in the United States Treasury, to the credit of the Cherokee Nation—exceeding $2,000,000—are ample, as provided by the act of April 26, 1906, as amended to equalize the allotments of all persons on the final or extended roll of Cherokee citizens as of March 4, 1906.

As set forth in findings XI, XII, and XIII, said acts of April and June, 1906, were passed by Congress at the request and on the petition therefor of the representatives of the Cherokee Nation appointed therefor with the approval of the President of the United States (31 Stat. L., 1077), and, therefore, so far as the nation could act in behalf of its citizens in that respect their consent, if that were necessary, was given to said acts.

The claimants' contention is that by virtue of the citizenship of the Cherokees under the act of March 3, 1901, and the allotment act of July 1, 1902, those enrolled under said act as of September 1, 1902, thereby acquired vested rights in and to all the common property of the Cherokee Nation, and having thereby acquired such vested rights it was not within the power of Congress to divest them thereof; that section 2 of said act of April 26, 1906, as amended, seeks to take the private property of the claimants, citizens of the United States,

without due process of law, and is therefore in violation of the fifth amendment to the Constitution of the United States.

On the part of the defendants, as well as of the Cherokee Nation, intervenor herein, it is contended that in respect to the tribal property, i. e., the unallotted lands and undistributed funds of said nation, the power of Congress is plenary.

The question, stripped of unnecessary verbiage, is: Did Congress by the act of July 1, 1902, in authorizing, with the consent of the members of the Cherokee Nation, the allotment and distribution of their common property as of September 1, 1902, thereby exhaust the conceded, hitherto, paramount authority of the United States over the tribal property of said nation?

For many years prior to said allotment act of July 1, 1902, and subsequent thereto, the Cherokee Nation, in the Indian Territory, held title to the lands sought to be allotted by patent issued by the United States December 31, 1838, in conformity with treaties then existing between them and said nation, subject, however, to the conditions that the nation should not become extinct or abandon possession of said land; and in the case of *Cherokee Nation* v. *Journeycake* (155 U. S., 196, 207) it was held that "by that patent, whatever of title was conveyed was conveyed to the Cherokees, as a nation, and no title was vested in severalty in the Cherokees, or any of them." (*Cherokee Trust Fund*, 117 U. S., 288.)

In *Cherokee* v. *Hitchcock* (187 U. S., 294, 307) it was said: "Whatever title the Indians have is in the tribe and not in the individual, although held by the tribe for the common use and benefit of all the members."

The Cherokee constitution provides that "the lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same in accordance with the provisions of article twenty of the treaty of nineteenth July, eighteen hundred and sixty-six, between the United States and the Cherokee Nation." (Sec. 2 of amendment to art. 1, constitution Cherokee Nation.)

By section 15, act March 3, 1893 (27 Stat. L., 612, 645), quoted in the case of the *Matter of Heff* (197 U. S., 488, 500)—as indicating the interest the United States claimed therein—it is provided that upon the allotment "the reversionary interest of the United States therein shall be relinquished and shall cease."

The members of said nation residing in the Indian Territory were, therefore, communal owners of the lands and funds of said nation on July 1, 1902, when the allotment act of that date was passed, as they were when the roll was made thereunder as of September 1, 1902, if not later; and had all of said lands and funds been actually allotted and distributed as of that date nothing would have remained upon which the subsequent acts, by their terms, could operate. The amount of land allotted was not determined by the commissioners, but was fixed in section 11 of the act.

On the other hand, each member of the nation is entitled, by reason of his communal ownership, to an equal share with his coowners in the common property, but the nature of the title is such that no right can vest in the individual to such share before allotment, even though he be a citizen of the United States. Nor is such right to the share enlarged or transformed into a vested right by the act of July 1, 1902,

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providing for the method and time of making such allotment, as, by section 31 of the act, the right of a member dying prior to September 1, 1902, becomes extinct and passes to the tribe in general. Nor is it necessary to this case for the court to consider whether the allottees in the allotments made under said act as of September 1, 1902, have vested rights in the shares so allotted further than to say that by section 21 of said act it is provided that the certificate shall be conclusive evidence of the right of the allottees to the tract of land described therein; but said allotments are not sought to be affected by the acts in question; and there yet remain unallotted lands and undistributed funds with which to equalize, as provided by the act of April 26, 1906, as amended, the allotments of all persons whose names appear upon the final or extended roll as of March 4, 1906.

Section 63 of the act of July 1, 1902, provides that "the tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six;" but by joint resolution of Congress, March 2, 1906 (34 Stat. L., 822), the tribal existence and present tribal governments of the Cherokee Nation and other civilized tribes in the Indian Territory were "continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law." And thereafter, by section 28 of the act of April 26, 1906, the tribal existence and present tribal government of said nation was, with certain restrictions therein specified, "continued in full force and effect for all purposes authorized by law until otherwise provided by law."

Therefore, in considering the questions involved, we shall assume the validity of those provisions continuing the tribal existence and tribal government of the Cherokee Nation in force and effect until all property of said nation shall have been distributed among the individual members thereof.

We must first note that the enrollments under the act of April 26, 1906, as amended, were made as of March 4, 1906, the date when, by the act of July 1, 1902, the tribal government of the Cherokee Nation was to cease. The evident purpose of Congress by said act of April, 1906, as amended, was to enroll all Cherokee citizens living as of the date when the tribal government was to cease.

While it was within the power of Congress, by the act of July 1, 1902, to fix the date for enrollment prior to the time therein fixed for the termination of the tribal government, no sufficient reason, other than the act itself, can be urged therefor on either legal or equitable grounds, and this was doubtless the view of Congress when, by the acts of April and June, 1906, the time of enrollment was extended to the date fixed for the termination of the tribal government. This act is in harmony with the act June 28, 1898 (30 Stat. L., 495, 513), respecting the Choctaw and Chickasaw nations, wherein it is provided that: "It is further agreed that the Choctaws and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States."

True, the acts of April and June, 1906, were passed after the date fixed for the termination of the tribal government, but their operation respecting those to be enrolled was limited to March 4, 1906. Hence but for these acts children of enrolled Cherokee parents under

the act of July 1, 1902, though living during the existence of the tribal government, would have been denied their rights as communal owners in the common property; and it is no answer to say that the communal rights of the members of the nation in the lands were severed by the act of July 1, 1902, and thereby became vested as of the date of enrollment thereunder, for the tribal government was to continue until March 4, 1906, of which the allottees were bound to take notice; and so long as the tribal government existed no right as between themselves or as against the United States could vest in severalty in the common or unallotted property. In other words, nothing short of actual allotment in severalty, as provided by law, will give the individual members of the nation vested rights as against the United States. The act does not seek to divert the lands from the communal owners and give them to strangers, but merely extends the time for allotment so as to include and equalize allotments to all those living on the date fixed for the termination of the tribal government.

The relation between the Government and the Indians being that of a superior dealing with an inferior the Government may discontinue that relation at any time, but it is for Congress and not for the courts to determine when that shall take place. Nor is the power of the Federal Government to protect the Indians "dependent upon the preservation of tribal relations." (*Matter of Heff*, 197 U. S., 488, 496.)

Although the Cherokee Nation as a body politic, with a written constitution and system of laws for the protection of persons and property within its jurisdiction, has been recognized by the United States in their treaties with them, nevertheless the Cherokees since the treaty between them and the United States of November 28, 1785 (7 Stat. L., 18), have acknowledged that they were under the protection of the United States and no other sovereign.

A similar provision was in the treaty made with them as a nation July 2, 1791 (7 Ibid., 39). (*Cherokee Trust Funds*, 117 U. S., 288, 295; *Delaware Indians* v. *Cherokee Nation*, 197 Ibid., 127).

The court, in the first of the cases cited, makes reference to and comments on the various treaties between the Cherokees before and after their separation and their subsequent union, in all of which treaties the paramount authority of the United States for their protection is acknowledged. But independent of such treaties and their acknowledgment, the Cherokees and other Indians have been, since our Government was organized, subject to the paramount authority of the United States, exercised by Congress; and they and the territory occupied by them being within the geographical limits of the United States have at all times been subject to the laws of Congress enacted for their protection as well as for the protection of the people with whom they come in contact (*Worcester* v. *Georgia*, 6 Pet., 515). In other words, the United States, had they so elected, might from the first, without the consent of the Indians, have controlled them and their tribal property by acts of Congress instead of by treaties (*United States* v. *Kagama*, 118 U. S., 375, 379). And the purpose to control them by acts of Congress instead of by treaties was indicated by the act of March 3, 1871 (now Rev. Stats., sec. 2079).

Referring to that section the court, in the *Matter of Heff* (197 U. S., 488, 498), said: "From that time on the Indian tribes and the indi-

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vidual members thereof have been subject to the direct legislation of Congress, which, for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life."

Further, in commenting on the power of Congress in that same case, the court, quoting from the case of *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 565), said: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government."

And after quoting numerous authorities in support of that holding and other authorities looking to the protection of the Indians, the court said: "But none of the decisions affirming the protection of the Indians questioned the full power of the Government to legislate in respect to them."

Furthermore, in the case of the *Cherokee Nation* v. *Hitchcock* (187 U. S., 294) the court held, in effect, that Congress, by the act of June 28, 1898, "practically assumed the full control over the Cherokees as well as the other nations constituting the Five Civilized Tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property." (See also *Delaware Indians* v. *Cherokee Nation*, 193 U. S., 127.)

To the same effect also is the case of *Wallace* v. *Adams* (204 U. S., 415) respecting citizenship in the Indian tribes.

In the case of *United States* v. *Rickert* (188 U. S., 432, 445), in commenting on the contention that the State had conferred upon the Indians the right of suffrage and for that reason they ought to share the burdens of taxation like other people, the court said: "These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attached to citizenship. That is a political question, which the courts may not determine. We can only deal with the case as it exists under the legislation of Congress." And that case was quoted with approval in the case of *Matter of Heff* (197 U. S., 488, 497).

Again, in the case of *McKay* v. *Kalyton* (204 U. S., 458, 468), the court said: "The *Rickert* case settled that, as the necessary result of the legislation of Congress; the United States retained such control over allotments as was essential to cause the allotted land to enure during the period in which the land was to be held in trust 'for the sole use and benefit of the allottees.'"

It is due to the counsel for the claimants to say that we do not understand them as controverting the paramount authority of the United States over the tribal property of the Cherokees; but their contention is that as Congress conferred citizenship upon the Cherokees, and thereafter by the act of July 1, 1902, authorized the allotment and distribution of the common property as of September 1, 1902—to those living on that date—their right in and to the respective shares so authorized to be set apart thereby became vested as of September 1, 1902, and hence no tribal property remains upon which the act of April, 1906, as amended, can operate.

In this view of the case the act might be held valid, though inoperative to effect its purpose. But their further contention is that sec-

tion 2 of the act of April, 1906, seeks to deprive the Cherokee citizens enrolled as of September 1, 1902, of the vested rights acquired by them under the act of July 1, 1902, to their respective shares in all the common property, whether actually set apart as of September 1, 1902, or not; and in this respect no distinction is made between the lands so held and the money in the Treasury to the credit of the nation, though it is conceded that none of the money so held has been actually distributed, and that lands enough remain, if the act of 1906 is valid, to make allotments upon the basis already made under the act of 1902, to about 3,800 persons, leaving 2,810 persons who would receive $651.20 each out of the fund so held.

In the contention thus made the claimants of necessity divorce the Government from the control of the Indians and their property and place them upon an equality of rights with other citizens of the United States, although their tribal government, as provided by the act under which they claim, was not to cease until March 4, 1906.

We must assume that Congress had some purpose in keeping alive the tribal government until March 4, 1906, and by subsequent acts continuing the same in full force for all purposes under existing laws until all the lands of the nation and the funds to its credit shall have been allotted and distributed. By these acts the Government asserted its continued guardianship until the final distribution of the common property; and under the authorities cited we think it can not be successfully controverted that if before any allotments had been made under the act of 1902, Congress by amendment had inserted the date March 4, 1906, in lieu of September 1, 1902, allotments as of the latter date would have been valid and effective to bind all, as under the authorities cited, no rights could vest in severalty in communal property by the mere force of a statute. If they could, then, under the act of March 3, 1901, supra, they would have vested as of July 1, 1902, the date fixed by the Secretary of the Interior by authority of said act of 1901. But as before stated the case here proceeds upon the theory of the validity of the extension to September 1, 1902.

Under the authorities cited we do not believe rights became vested in the Cherokees until there was an actual severance of the communal property and the issuance of a patent, and then only to the extent of the property therein actually conveyed to the allottees pursuant to law.

Section 2, act of April 26, 1906, as amended, in terms applies only to minors living March 4, 1906, whose parents had been enrolled; and as all Cherokee citizens living on September 1, 1902, had been enrolled, it follows that the act applies only to minors born to such parents after September 1, 1902, who were living on March 4, 1906. In other words, the act of 1906 does not interfere with the roll or the allotments made under the act of 1902, but adds to the roll the minors so born to share equally with the allottees under said act—not to take from such allottees what has been set apart to them, but to apply the unallotted lands and undistributed funds so as to equalize allotments of persons on the final or extended roll as of March 4, 1906.

Our attention has been called to the case of Garfield, Secretary of the Interior, *v.* United States, ex relatione Goldsby, decided by the Supreme Court, November 30, 1908, wherein the name of Goldsby, a Chickasaw Indian who had received a certificate entitling him to a

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patent, had been stricken from the allotment roll without notice, and the court held that mandamus was the proper remedy to restore his name to the roll, as the Secretary of the Interior was required to perform a plain official duty requiring no exercise of discretion. Clearly this was right, as Goldsby was on the roll and had received a certificate of allotment, which, under section 23 of the act of July 1, 1902—under which he was enrolled—(32 Stat. L., 641), was declared to be conclusive evidence of his right to "the tract of land described therein."

In the present case certificates had been issued to the allottees, which, under section 21 of the act of July 1, 1902, respecting the Cherokees, were declared to be "conclusive evidence of the right of an allottee to the tract of land described therein," of which, under said section, they were entitled to be put in possession.

By sections 58 and 59 of said act the issuance of patents was provided for with the approval of the Secretary of the Interior; and assuming that the title to the tracts of land so described in the certificates became vested in the allottees severally it was, nevertheless, subject to the provisions of sections 14 and 15 prohibiting alienation thereof before the expiration of five years from the date of ratification of the act, and to section 72 against renting their allotments for grazing purposes for more than one year or for agricultural purposes for more than five years, except with the approval of the Secretary of the Interior, when such allotments may be leased for longer terms for either grazing, agricultural, or mineral purposes.

By section 11 of said act the Commission to the Five Civilized Tribes was not only limited in the allotments to "land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation," but section 18 of the act makes it unlawful, after ninety days from the date of ratification, "for any member of the Cherokee tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation;" and for any violation thereof he "shall be deemed guilty of a misdemeanor," punishable by fine of not less than $100 and "shall forfeit possession of any property in question."

While it may be that Congress at the time of the passage of the act intended to allot all the lands held by the Cherokee Nation except those reserved under section 24, still by section 72 of the act provision was made for the collection by the Secretary of the Interior of a reasonable grazing tax from the owners of cattle grazed "on lands not selected as allotments by citizens," and, too, for the benefit not of the allottees as of September 1, 1902, severally or collectively, but for the benefit of the tribe, which of necessity included all of its members then living. The act being silent as to the disposition of the unallotted lands, as the claimants concede, further legislation was necessary therefor—and this, also, the claimants concede; but they in effect say that Congress by the act of July 1, 1902, limited their power to allot such lands to any but the allottees under said act.

The omission in the act to provide for unallotted lands was supplied by section 16 of the act of April 26, 1906, which, in substance, provides for the sale of any unallotted lands and the payment of the proceeds thereof into the Treasury of the United States to the credit of the tribe.

Certainly Congress did not intend that rights should become vested in lands for the allotment or other disposition of which no provision was made in the act. Nor do we believe the language of the act of 1902 is susceptible of such construction. It may be inferred that Congress, by section 5 of the act of April 26, 1906, as amended, providing that patents or deeds to allottees should be recorded "and when so recorded shall convey legal title," thereby intended that allottees should acquire legal title only after the patents or deeds to them, respectively, had been recorded.

If the contention of the claimants is well founded then, by the act of July 1, 1902, the claimants, as citizens of the United States, acquired as against the United States vested rights to an equal share in all the lands held by the Cherokee Nation as of September 1, 1902; and if so, then the title in the Cherokee Nation was divested and merged in the several allottees, subject only to the execution of the muniments of title. But certainly it would not be contended that a mandamus would lie to compel an allotment of the remaining lands because, forsooth, Congress, while intending to make provision for the allotment of the lands to those living September 1, 1902, had failed. Statutes frequently fail of their purpose and further legislation becomes necessary; and if necessary, then it is for Congress, within their constitutional powers, to determine what that legislation shall be. Not that Congress have the power to take the land of one person and give it to another, but that among communal owners Congress may say when the lands so owned may be allotted, and may, for reasons satisfactory to them, of which they are the judge, extend the time for the allotment or disposition of the communal or tribal property so as to include all living on the date when the tribal government ceases.

When a citizen has acquired a right to the use and possession of property according to law, or when such right has become complete and consummated, requiring no further act to enable him to enjoy it, such right is within the protection of due process of law and therefore vested. That is to say, he has acquired a right in property which is enforceable in favor of a definite person. But conceding the application of the rule stated to the allottees in the land set apart to them under the act of July 1, 1902, it will not apply to the unallotted lands to which they have acquired no individual right of possession or enjoyment and therefore not within the protection of due process of law. In other words, the rights of said allottees under the act of July 1, 1902, in and to the unallotted lands after September 1, 1902, remained the same as they were before that date.

Assuming that the Cherokees by reason of the ratification by them of the act of July 1, 1902, thereby acquired contractual rights in and to the quantity of land therein authorized to be set apart, such rights can not be enlarged so as to include lands not allotted, and for which no provision was made. Therefore such lands remained subject to future legislation. Nor did the citizenship of the allottees deprive Congress of the right to control the remaining tribal property. (*Cherokee Nation* v. *Hitchcock*, supra.)

While the right to private property is a sacred right it has its limitations and restrictions. "It must have some regard to the general welfare and public policy; it can not be a right which is to be examined, settled, and defended on a distinct and separate consideration of the individual case, but rather on broad and general grounds,

55 which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all." (Cooley's Constitution- Lim. 4th ed., p. 443.)

The rule there announced is applicable to the present case as the act of April 26, 1906, as amended, embraces the welfare of the whole tribe and seeks "the equal and impartial protection of the interests of all" in the common property until tribal relations cease. This is doing exact justice to all, and anything short of this would be a violation of the trust reposed in the Government in dealing with its dependent wards.

By the act of June 28, 1898, supra, respecting the Choctaws and Chickasaws, it was provided that when their tribal governments cease they "shall become possessed of all the rights and privileges of citizens of the United States," from which we conclude that Congress did not intend to surrender their power of control over tribal property so long as tribal relations existed. Furthermore, when such tribal relations do cease good faith requires that the Government shall not leave the Indian in the dark either as to his rights or the means by which such rights may be protected.

We deem it unnecessary to prolong the discussion, as under the authorities cited and the conclusions we have reached we must hold that the claimants acquired no vested rights in the allottable lands remaining after the allotments to them of the quantity specified in section 11 of the act of July 1, 1902, as no further provision is made therein for allotment of the remaining unallotted lands; and certainly no interest became completed in the remaining unallotted lands before the act of April 26, 1906, as amended, was passed; and therefore the claimants acquired no vested rights therein or rights the taking of which would be obnoxious to the fifth amendment of the Constitution. It follows that we must hold that the act of April 26, 1906, as amended, is a valid statute, though we may add that if we entertained doubt, we should, nevertheless, incline to resolve all doubt in favor of the validity of the statutes, leaving the Supreme Court to finally determine the question.

For the reasons we have given the petition is dismissed and judgment ordered for the defendants.

56 VII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the fourth day of January 1909, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of David Muskrat and J. Henry Dick, on their own behalf and on behalf of all Cherokee Citizens enrolled as such for allotment as of September 1, 1902, be, and the same is hereby dismissed.

BY THE COURT.

57 VIII. *Order of Court on Claimants' Motion for New Trial and Defendants' Motion for Amended Findings.*

On January 19, 1909 the claimants filed their motion for a rehearing, and on March 29, 1909 the defendants filed their motion for amended findings of fact.

On March 29 & 30, 1909 these motions were argued and submitted.

On June 10, 1909 the following order was filed by the Court:

Order.

The claimants' motion for a new trial is overruled.

The claimants' motion and the defendants' motion to amend findings are allowed in part and overuled in part, as shown by findings this day filed as of January 4, 1909. The judgment and opinion to stand.

Howry, J., withdraws his former opinion in part, and will file a substitute opinion before the allowance of any motion for an appeal.

BY THE COURT.

Filed June 10, 1909.

On June 10, 1909 Howry, J., filed the following opinion on the claimants' motion for a new trial:

Opinion on Motion for New Trial.

HOWRY, *Judge,* delivered the following opinion:

Since the reargument of this cause and a closer examination of the questions the doubts which have occurred to me respecting the validity of the legislation referred to the court for determination, will be stated with my conclusions, because I do not subscribe to everything the majority of the court have said, either in their original or revised opinion. My statement will at least show no want of reflection on the merits of the case.

I am free to state these doubts in my own way, because of the character of the act of our jurisdiction and because of the reasons which apparently led to its passage.

Ordinarily, every reasonable doubt respecting the constitutionality of statutes should be resolved by the courts in favor of the validity of such legislation. But the prompt action of Congress in acting upon

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the able report of one of their committees saying that the acts here complained of were not valid presents something different from the ordinary case coming before a court under the general rule stated.

Congress conferred upon the Cherokees subject to enrollment under the act of July 1, 1902, 32 Stat., 716, an undivided individual proportionate interest in the surplus lands and funds of the Cherokee Nation, so as to exclude all others from participation. The act was silent as to the *method of disposition* of those lands which should remain unallotted, but it expressly provided that if any person entitled to be enrolled should die subsequent to September 1, 1902 before receiving his allotment, the lands which would have been allotted to said person, if living, should be allotted in his name and should, "with his proportionate share of other tribal property," descend to his heirs, according to the laws of Arkansas. By the terms of the act it was provided that the scheme for all distributions should be submitted for ratification to the Cherokee people. The scheme was so submitted, and subsequently ratified by the Cherokees and proclaimed by the United States and the authorities of the Cherokee Nation in effect as final. The number of persons entitled to enrollment for the purposes of allotment and distribution on July 1, 1902, being unknown, it resulted that after allotment to the duly enrolled members in accordance with the provision of the act of July 1, 1902, lands remain undisposed of sufficient to provide over 3,000 allotments, of the present aggregate value of about $3,000,000.

Subsequently, by an act approved April 26, 1906, provision was made for the enrollment of Cherokees who were minors living on March 4, 1906, whose parents had been enrolled as members of the Cherokee and certain other tribes. Notwithstanding the inclusion of the minors of Cherokee parents in the words of this latter act, it was provided that such applications for enrollment should not be received where the date of filing applications had been fixed by agreement between any tribe and the United States; and, the date for determination of filing applications having been fixed as of October 31, 1902, by the agreement between the United States and the Cherokees, it is claimed that the provision of the act of April 26, 1906, did not apply to the Cherokees. But by the act of June 21, 1906, 34 Stat., 325, this act was amended so as to repeal this provision and to make the said act of April 26, 1906, in this particular, apply to the Cherokees. The contention of the claimants is that the act of April 26, 1906, as amended June 21, 1906, deprives petitioners and all others on whose behalf this suit is brought of their vested property rights in and to the lands and funds and other undivided property of the Cherokee people in violation of the constitutional provision that no person shall be deprived of his property without due process of law.

Notwithstanding that it was provided by the act of July 1, 1902, that no child born after said date to a citizen of the Cherokee Nation should be entitled to any allotment or participation in the tribal property, and that the roll made under the act as of September 1, 1902, when approved, should be final, the court has found that under the later legislation 5,610 minor children of enrolled Cherokee parents, born after September 1, 1902, and living on March 4, 1906, have been enrolled on separate lists as Cherokee citizens the same as those enrolled under the act of July 1, 1902.

which embrace the welfare of the whole community, and which secure the equal and impartial protection of the interests of all." (*Cooley Constitution Lim.* 4th ed., p. 443.)

The rule there announced is applicable to the present case as the act of April 26, 1906, as amended, embraces the welfare of the whole tribe and seeks "the equal and impartial protection of the interests of all" in the common property until tribal relations cease. This is doing exact justice to all, and anything short of this would be a violation of the trust reposed in the Government in dealing with its dependent wards.

By the act of June 28, 1898, supra, respecting the Choctaws and Chickasaws, it was provided that when their tribal governments cease they "shall become possessed of all the rights and privileges of citizens of the United States," from which we conclude that Congress did not intend to surrender their power of control over tribal property so long as tribal relations existed. Furthermore, when such tribal relations do cease good faith requires that the Government shall not leave the Indian in the dark either as to his rights or the means by which such rights may be protected.

We deem it unnecessary to prolong the discussion, as under the authorities cited and the conclusions we have reached we must hold that the claimants acquired no vested rights in the allottable lands remaining after the allotments to them of the quantity specified in section 11 of the act of July 1, 1902, as no further provision is made therein for allotment of the remaining unallotted lands; and certainly no interest became completed in the remaining unallotted lands before the act of April 26, 1906, as amended, was passed; and therefore the claimants acquired no vested rights therein or rights the taking of which would be obnoxious to the fifth amendment of the Constitution. It follows that we must hold that the act of April 26, 1906, as amended, is a valid statute, though we may add that if we entertained doubt, we should, nevertheless, incline to resolve all doubt in favor of the validity of the statutes, leaving the Supreme Court to finally determine the question.

For the reasons we have given the petition is dismissed and judgment ordered for the defendants.

OPINION ON MOTION FOR NEW TRIAL.

HOWRY, *Judge*, delivered the following opinion:

Since the reargument of this cause and a closer examination of the questions the doubts which have occurred to me respecting the validity of the legislation referred to the court for determination, will be stated with my conclusions, because I do not subscribe to everything the majority of the court have said, either in their original or revised opinion. My statement will at least show no want of reflection on the merits of the case.

I am free to state these doubts in my own way, because of the character of the act of our jurisdiction and because of the reasons which apparently led to its passage.

Ordinarily, every reasonable doubt respecting the constitutionality of statutes should be resolved by the courts in favor of the validity of such legislation. But the prompt action of Congress in acting upon

The eleventh and twelfth findings of the court show that the Cherokee national council authorized its principal chief to appoint a commission to represent the Cherokee Nation in the preparation of legislation for the final settlement of their affairs and the relations of the tribe with the United States; that a commission was appointed accompanied by a joint resolution of the national council of the Cherokee Nation to the effect that all children born since September 1, 1902, and prior to March 4, 1906, should be entitled to share equally with children born prior thereto in the lands and moneys as provided by the act of July 1, 1902. The thirteenth finding shows that by a conference between this commission and representatives of the Interior Department and the House and Senate Committees on Indian Affairs legislation ensued providing for the enrollment of minor children living on March 4, 1906, as hereinbefore stated.

The validity of the legislation under consideration must be determined without reference to those acts of the Cherokee council which resulted in the appointment of its committee to secure from the United States the enrollment of the after-born children.

The findings which show the methods employed to obtain the action of Congress are immaterial, because under section 2 of the amendments to Article I of the constitution of the Cherokee Nation the character of the title to the lands of the nation had been changed. That section provided that the lands of the nation should remain common property—that is, common property of the nation for the benefit of the tribe—*until the national council should request the survey and allotment of the same* in accordance with the provisions of article 20 of the treaty of 19th of July, 1866, between the United States and the Cherokee Nation. The national council had already requested the survey and allotment of the lands in accordance with that treaty, and the request (having been submitted to the Cherokee people under a law of Congress to carry out treaties) had been ratified and the then existing controversy respecting the affairs of the tribe had been closed by a decision of this court, which was duly affirmed by the Supreme Court in the *Cherokee Intermarriage Cases*, 203 U. S., 93. Section 25 of the act of July 1, 1902, which imposed a limitation as to who should be enrolled exhausted the power of the Cherokee national council to make any further request in the premises. So any subsequent action of the council seeking to reverse the popular vote has nothing to do with this case.

The Cherokee lands had been before this act of July 1, 1902, conveyed to the Cherokee Nation in fee simple. *Holden* v. *Joy*, 17 Wall., 211. With the adoption of the Cherokee constitution the title to the common property passed from the communal owners and became vested in the nation as public lands and held by the nation in its political and corporate capacity for the whole tribe. *Whitmire's Case*, 30 C. Cls. R., 154; *Eastern Cherokees* v. *United States*, 40 C. Cls. R., 252; 202 U. S., 101. (See companion case of *Brown et al.* v. *United States*, 44 C. Cls. R.) So far then as the legislation had proceeded under the treaties by the act of July 1, 1902 (which professed to execute the treaties), the title to the unallotted lands and funds had passed out of the Cherokee Nation and had taken on the character, as to the persons authorized to be enrolled as of September 1, 1902, of an ownership in common for the benefit of all the members of the tribe living as of September 1, 1902.

Aside from the want of authority of the Cherokee council to pass any resolution which could bind the individuals declared by law to be entitled to the unallotted lands and funds, the resolution was ineffective for the want of approval by the President (30 Stat., 84; 31 *ibid.*, 1077); nor can we assume that any request emanating from the Cherokee council led Congress to take from the enrolled Cherokees the property which the act of July 1, 1902, attempted to give to them, because the act of April 26, 1906, excluded the Cherokees from its operation. Though the amendment of June 21, 1906, did in terms make the obnoxious legislation applicable to the undistributed lands and funds of the Cherokee citizens there is nothing to show any agreement between the Cherokee council and Congress which led to that amendment.

The ultimate question for determination is whether the lands and funds not allotted became the private, personal property of those citizens of the United States yet known as Cherokees living at the time fixed for final enrollment and their heirs as tenants in common. That is, whether the unallotted lands and funds remained in the hands of the United States as trustee to distribute among the aforesaid *cestuis que* trust named as such by a law formally approved by the contracting parties, or became the subject of other and different disposition according to the will of Congress.

The majority of the court reason that the act of April 26, 1906, as amended, is valid because that legislation "embraces the welfare of the whole tribe" under a rule which seeks the equal and impartial protection of the interests of all in the common property until tribal relations shall cease. It does not, however, seem to me that such a rule (merely of welfare) can be invoked, because this is not a matter of expediency or of sentiment, but one of right claimed on the one side and denied on the other under an alleged contract made by and for persons living September 1, 1902. And if it be true, as stated at the argument (and not denied), that three-fifths of the after-born children were of white parentage the welfare of the whole tribe—certainly not of the full-bloods—is not established.

Incidentally the white parents of three-fifths of the new class might profit, while those to whom no children were born subsequent to the contract would receive no benefit.

Nor in the attempt to equalize 3,800 allotments among a new class numbering 5,610 it must not be overlooked that (if the matter of welfare is to be considered) it is only the rights and not the convenience and advantage of the after-born children which can be considered.

This court recently decided under a special act that conferred jurisdiction and under which 1,200 colored people shared in the distribution of certain Cherokee funds but were denied admission to the rolls under this allotment scheme (their rights probably being the same), that the court would retain a cause which those persons had instituted, to see that complete justice should be done to all such claimants whose names do not now appear on the rolls. *Whitmire, Trustee*, v. *United States*, 44 C. Cls.

All this, however, is beside the real question.

The joint resolution of March 2, 1906, continued the existence of the governments of the civilized tribes *under existing laws* until all

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property should be distributed. The claimants contend that this surplus remained in the hands of the United States as trustee to distribute among those whom the United States had recognized by law as owners of the property in carrying out the treaties of the Government with the Cherokees.

Some state decisions are referred to in support of the contention. Thus, in *Drew* v. *Carroll*, 28 N. E. (Mass.), 148, a statute was considered by the supreme court of Massachusetts which made all Indians citizens of the State and gave the right to the Herring Pond Indians to have partition of their common land to be afterwards divided; and where a scheme of allotment through state officers was provided in the act it was held that immediately upon their being made citizens each Indian acquired an undivided right, title, and interest in the lands, which he could mortgage even before partition was had.

In *Webster* v. *Reid*, 1 Morris (Iowa), 615, where certain half-breeds of the Sac and Fox tribes held fee simple title as tenants in common, it was held that the legislature had not the power to destroy vested rights, although it might create or augment them. This case was followed by that of *Wright* v. *Marsh*, 2 Green (Iowa), 94, where it was held that no feature of an act could be considered as valid or effectual which would have a tendency to destroy, or even impair, vested rights.

If the act of July 1, 1902, was an agreement with the members of the Cherokee tribe, and such members were citizens of the United States, there is great force in the argument that each member of the tribe living September 1, 1902, acquired an undivided interest in the common lands, free from any right of change, because the future distribution of that property was designed to be ministerial in character; and the exercise of further plenary power on the part of the Government was not intended except for the benefit of those embraced in the ratified agreement.

The further contention that when citizenship was conferred there was no tribe is likewise of much force. The Cherokee government remained, but the tribal right of control of the land had gone out of that government for the benefit of individuals. Indian courts had been abolished, and the members of the tribe had practically assimilated such rights as all other citizens enjoyed.

The majority of the court is of opinion that "the rights of said allottees under the act of July 1, 1902, in and to the unallotted lands after September 1, 1902, remained the same as they were before that date." Petitioners and persons associated with them were the exclusive owners at the time mentioned, with the right ultimately under treaties to have an equal share of the common property whenever the time might be agreed upon. This right did not depend wholly upon the act of July 1, 1902, but was primarily dependent (the United States consenting) upon a law of the Cherokees as well fixed and settled as the laws of descent and distribution elsewhere. It is a contradiction to say that under the new legislation the rights of the allottees fixed by the act of July 1, 1902, remained the same in and to the unallotted lands if a new class numbering 5,610 people be admitted, because the new class must necessarily absorb every piece of unallotted land and to make this new class equal nearly all the available funds must likewise be absorbed for the benefit of the new class. Thus, the rights of the former allottees are in effect superseded and

are therefore no rights at all if the Congress have the power to take land and moneys from the old class to give to the new.

Prior to September 1, 1902, the Cherokees were entitled to claim as communal owners, but after that date they were equitable owners free from Cherokee national control. And the Cherokee agreement said that no child born after September 1, 1902, should be born into the right and that no person dying after that date should die out of the right. By the act of July 1, 1902, Congress recognized the prerogative of the Cherokees to change the character of their title from communal to common. The Cherokees adopted the change, and we have seen, according to the decision of the Supreme Court, that both parties to the agreement gave their formal consent.

From the foregoing it will be seen that there is great reason to doubt the validity of the legislation which forms the subject-matter of the petitioners' complaint. Generally speaking, any estate, property, or interest is called "vested," whether in possession or not, which is not subject to any condition precedent and unperformed. The interest may be either a present and immediate interest, or it may be a future but uncontingent, and therefore transmissible, interest. A vested estate in possession is a term applying to a right of present enjoyment actually existing.

In constitutional law vested rights are those which have so completely or definitively accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and which it is right and equitable that the Government should recognize and protect as being lawful in themselves, and settled according to the then current rules of law, and of which the individual can not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare. Black's L. Dic., 1218.

Notwithstanding that the act of July 1, 1902, was a promise in redemption of treaty agreements, the legal title to the unallotted lands—accompanied by possession—is not yet in a single individual living as of September 1, 1902. In *Stephens* v. *Cherokee Nation*, 174 U. S., 445 (which was predicated upon the ruling in *Choctaw Nation* v. *United States*, 119 U. S., 27), the determination of membership in a tribe was reserved by the government for the purpose of adjusting all rights in the tribal property. That case in effect and generally holds as to unallotted lands and undistributed moneys that such lands and moneys remained public lands and public moneys *until* held in individual ownership. The court there said that "The assertion by any particular applicant that his right therein is so vested as to preclude inquiry *into his status* involves a contradiction in terms." But that expression related to those who were claiming as entitled but whose right as a member was the subject of investigation by lawful authority. The scope of the decision was, however, that Congress could legislate if the subject of the legislation related to tribal property. The act under consideration in that case was spoken of as correlative legislation which related to the determination of membership in the tribes for the purpose of adjusting rights in the tribal property. The court *declined to intimate any opinion as to the effect of changes* made by the subsequent legislation or by the agreements mentioned as

having been made, respecting the "status" of the petitioners. In *Cherokee Nation* v. *Hitchcock*, 187 U. S., 307, title remained in the tribe and did not vest in the individuals although held by the tribe for the common use and equal benefit of all the members; and in that respect the correlative legislation like that in the Stephens case, *ante*, related to the determination of membership in the tribe for the purpose of adjusting the property right. In the Hitchcock case the court adverted to the case of *Cherokee Trust Funds*, 117 U. S., 288, where it was said that whatever title the Indians had was in the tribe and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. The Hitchcock case rested further administrative control upon the statement that the lands and moneys involved *were public lands and public moneys where treaties had not evinced any intention upon the part of the Government to discharge the beneficiaries from their condition of pupilage or dependency.*

Following these decisions came the case of *Lone Wolf* v. *Hitchcock*, 187 U. S., 553, which dealt with an act passed at a time when the tribal relations between certain confederated tribes still existed and where the original statutes and the statutes supplementary thereto dealt with the disposition of property undoubtedly tribal, in which the court said that administrative control continued at least *so far as tribal lands were concerned.*

It was competent for Congress to provide by additional legislation for the verification of the rolls directed to be prepared so that only those persons possessing the necessary qualifications should receive anything.

Whether it was competent to admit another and different class by later legislation depends upon the character of the title and the relation of the property to the members of the tribe. In a sense the unallotted lands were not tribal lands after September 1, 1902, because the tribal interest theretofore held by the nation had passed to a class with a common individual right with such an interest in the land as that death could and did terminate as to the person dying, but transmissible to an heir and yet made the subject of partition by the agencies of the government for the benefit of those living and the heirs of those dying. The right being transmissible to heirs, and inheritable by those entitled to share by virtue of parentage it would seem that the continued existence of the Cherokee government was solely for the purpose of enabling the United States, in cooperation with the Indian government, to carry out the scheme. If the existence of the Cherokee government June 21, 1906, gave 5,610 infants living on March 4, 1906, the right to participate and yet excluded those born since the last-mentioned date up to the period of final allotment, we find an unequal distribution at last because of the continuation of the Cherokee *government* to a later date. Consequently, those born since the 4th of March, 1906, may even now be admitted to share if the act of 1906 is a valid statute.

The contention that the act of July 1, 1902, took from the unallotted lands the character of tribal lands is not without force, because that act evinced a clear intention to carry out treaty agreements by definitively providing for certain individuals to be enrolled as tenants in common. In *Delaware Indians* v. *Cherokee Nation*, 193 U. S.,

127, Mr. Justice Day declared, on the authority of the *Cherokee Trust Funds case*, 17 U. S., 308, that the lands of the Cherokees *then* belonged to the nation as a political body and not to the individual members of the tribe. But in speaking of the rights of individual Cherokees *as matters then stood*, it was said that each Cherokee "had a right to use parcels of the lands thus held by the nation, subject to such rules as its governing authority might prescribe." In *Eastern Cherokees* v. *Cherokee Nation* et al., 202 U. S., 101, Mr. Chief Justice Fuller also dealt with the matter of Cherokee title in its then condition and stated that the Cherokee government was trustee for all of its people. In the *Cherokee Intermarriage cases*, 203 U. S., 76, from which decisions this litigation sprang (inasmuch as large numbers of the intermarried whites were declared not entitled to participate, thereby leaving an excess of unallotted land), it was said that the amendments of 1866, article 1, section 2, of the treaty declared that the lands of the Cherokee Nation should remain common property, title being in the nation, *until* the national council should request the survey and allotment of the same pursuant to the treaty of July 19, 1866. As the request of the national council was duly made, it can not be denied that the new legislation was framed in disregard of the amendment to that treaty. In fact, the terms of those agreements were broken by the legislation which admitted a class not sanctioned by the whole body of people in actual interest.

Without speculating further upon the nature of the Cherokee title (a full exposition of which may be found in *Whitmire's case*, 30 C. Cls. R., 148, and *Cherokee Nation* v. *Journeycake*, 155 U. S., 196), and the changes made by the agreement resulting from the action of the Cherokee government and the United States it is apparent that though the subsequent legislation admits a new class the unallotted lands are in a sense yet tribal. They belong to Cherokees but have not been reduced to possession. There is yet no right in severalty free from some administrative control by the United States, true though it is the unallotted lands do not seem to be subject to the further operation of the Cherokee constitution, because the title passed out of the nation so far as the ratified agreement could have that effect.

The new class provided by the later and amended legislation can participate only upon the theory that notwithstanding the tribe had elected for a specific division among those living September 1, 1902, it was competent to admit the newly born people because those provided for by the act of July 1, 1902, had not come into the possession as individuals of the property proposed to be given to them in final form. The body of unallotted lands was and is yet a public-trust estate for the benefit of Cherokee Indians even though such Indians have been invested with the status of citizenship. The lands and moneys in controversy being yet public lands and public moneys and no certificate or patent having issued to fix the private right in severalty, it is probably safest to say that the political power of the Government to deal with the unallotted lands and make final disposition of all the undistributed property has been properly exercised.

Whilst not unmindful of the suggestion that the individual members of the tribe enrolled as of September, 1902, and their heirs became as much entitled to the surplus lands and undistributed funds as to the lands allotted and confirmed by patents and possession, this court

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must conform as near as may be to what the supreme authority has indicated with respect to administrative control where Indian lands are yet undivided and tribal. True, none of the cases cited present the exact question presented here because the nature of the compact disclosed by this record makes the circumstances different.

But the Indian interest in the unallotted property was not an enforcible interest in the courts, and until Congress completed the scheme by making the final distributions in the Government's own way the equitable owners were remediless. When the political authority saw fit to change the supposed fundamental agreement by incorporating new beneficiaries before the actual dissolution of the tribe, the courts apparently were not at liberty to interfere.

As to the allotted lands, title vested in fee simple as to every tract surrendered. The guardianship of the Government over the Indian's exclusive control and possession of land conferred by patent no longer existed. The United States could exercise no control because the trust relationship had ceased to exist. Every individual holding by patent obtained a vested right in fee from the Cherokee Nation by and with the consent and cooperation of the United States, which, in the words of the Supreme Court, "can not be divested by any subsequent act of Congress or by the executive departments." 175 U. S., 19–21.

In the doubt growing out of the interpretation to be given to what the court of last resort has said with respect to that which is or may not be tribal property I am unwilling now to say that the legislation which provides for the after-born children to participate in the surplus property is unconstitutional, and therefore invalid. Accordingly, I concur in the result that the petition be dismissed.

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66 IX. *Application for, and Allowance of, Appeal.*

In this cause come the petitioners by attorney and pray an appeal to the Supreme Court of the United States from the judgment of this court entered on the 4th day of January 1909.

WM. H. ROBESON,
DAN'L B. HENDERSON,
JOHN J. HEMPHILL,
Attorneys for Petitioners.

Filed August 27, 1909.

Ordered: That the above appeal be allowed as prayed for.

STANTON J. PEELLE,
Chief Justice.

August 28, 1909.

67 In the Court of Claims.

No. 29986.

DAVID MUSKRAT and J. HENRY DICK, on Their Own Behalf and on Behalf of all Cherokee Citizens Enrolled as Such for Allotment as of September 1, 1902,

vs.

THE UNITED STATES.

I, Archibald Hopkins, Chief Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusions of law filed by the Court; of the opinion of the Court; of the final judgment of the Court; of the order of the Court on the motion of the claimants for re-hearing and of the defendants for amended findings of fact; of the opinion of Howry, J., on said motion for new trial; of the application of the claimants for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 20th day of September, 1909.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 21,829. Court of Claims. Term No. 330. David Muskrat and J. Henry Dick, on their own behalf and on behalf of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, appellants, vs. The United States. Filed September 20th, 1909. File No. 21,829.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

DAVID MUSKRAT AND J. HENRY DICK, ON their own behalf, etc., appellants,
v.
THE UNITED STATES.
} No. 330.

APPEAL FROM THE COURT OF CLAIMS.

MOTION TO ADVANCE.

On behalf of the United States, the Attorney-General respectfully moves the court to advance the above-entitled cause for hearing immediately after the cases of *Marchie Tiger* v. *The Western Investment Company et al.*, No. 60, and *William Brown and Levi B. Gritts, on their own behalf, etc., appellants*, v. *The United States*, No. 331, for the following reasons:

(1) Recently, on the motion of the Attorney-General, this court postponed the latter case for hearing with the former, having previously advanced it for hearing at the beginning of this term.

(2) The *Tiger* and *Brown* and *Gritts* cases involve the validity of recent legislation concerning the Five Civilized Tribes in so far as it attempts to extend restrictions previously imposed upon the alienation of allotted lands by full-blood Indians of said tribes, while the present case is a suit specially authorized

to be brought against the United States by the act of March 1, 1907 (c. 2285, 34 Stat., 1015, 1028), to determine the validity of said legislation in so far as it attempts to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, the date previously fixed by Congress for closing the roll.

(3) The act of March 1, 1907 (c. 2285, 34 Stat., 1015, 1028), expressly provides that for the speedy determination of the questions involved in the present case and the *Brown* and *Gritts* case, precedence shall be given to them by the courts and by the Attorney-General.

(4) In all three cases the Indians concerned are members of the Five Civilized Tribes whose status and relation to the United States are pertinent and are to be determined by an examination of substantially the same legislation.

(5) The present case, therefore, although it involves questions peculiar to itself, nevertheless has so much in common with the *Brown* and *Gritts* and *Marchie Tiger* cases that it will conserve the convenience and time of the court if it be advanced for hearing immediately after said cases.

Notice of this motion has been served upon opposing counsel, and they concur therein.

GEORGE W. WICKERSHAM,
Attorney-General.

OCTOBER, 1910.

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IN THE

Supreme Court of the United States.

No. 663.

DAVID MUSKRAT and J. HENRY DICK, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, *Appellants*,

vs.

THE UNITED STATES.

Motion to Advance for Hearing.

Come now the appellants and move this Honorable Court to advance this cause for hearing, for the following reasons, to wit:

1. The action is brought to deny the power of Congress to dispose of unallotted lands comprising a part of the former Cherokee domain, aggregating about 380,000 acres estimated to be of the value of $10 to $20 per acre, and of former Cherokee funds now in the Treasury of the United States, aggregating about $1,300,000, to a class of persons not contemplated in the Act of Congress of July 1, 1902 (32 Stat. L., p. 716), known as the Cherokee Allotment Act.

2. The constitutionality of the act of June 21, 1906 (34 Stat. L., 1908), amending the act of April 26, 1906, is attacked as being one which deprives the enrolled Cherokees, citizens of Oklahoma, known as Cherokee allottees, of property of great value, without due process of law.

3. If the decision of the inferior court be reversed, further legislation will be necessary to effect the final disposition of the lands remaining unallotted; and the large sum of money remainiug in the Treasury can, and probably will, be disbursed to the enrolled Cherokees, the condition of many of whom is one of abject poverty.

If the decision be affirmed, about six thousand unenrolled and unallotted Cherokees will receive

said lands and money within a comparatively short time.

A decision modifying the decree might be rendered which would affect advantageously both the appellants and the class of persons for whom the United States appears as defendant.

The desire of Congress to have a speedy judicial determination of the questions involved appears from the authority given in the jurisdictional act herein to ask the advancement of the cause, as will appear from its terms, as follows:

> "That * * * David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee ctiizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, so far as said acts, or any of them, attempt * * * to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two.
>
> "And jurisdiction is hereby conferred upon the Court of Claims, with the right

of appeal by either party to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

"The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts and by the Attorney-General, who is hereby charged with the defense of said suits." (34 Stat. L., 1015, 28.)

Respectfully submitted,

WILLIAM H. ROBESON,
DANIEL B. HENDERSON,
JOHN J. HEMPHILL,
Attorneys for Appellants.

SUPREME COURT OF THE UNITED STATES

October Term, 1939

No. 326

DAVID MUNGRAS, Jr., ROBERT [illegible], as Trustees of the Property of Burlington Transportation Company, Debtor, Appellants, a Corporation,

v.

THE UNITED STATES

STATEMENT AND BRIEF ON BEHALF OF APPELLANTS

[illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 330.

DAVID MUSKRAT AND J. HENRY DICK, ON THEIR OWN BEHALF AND ON BEHALF OF ALL CHEROKEE CITIZENS ENROLLED AS SUCH FOR ALLOTMENT AS OF SEPTEMBER 1, 1902,

vs.

THE UNITED STATES.

STATEMENT AND BRIEF IN BEHALF OF APPELLANTS.

This cause is pending in this honorable court on appeal from the judgment of the Court of Claims dismissing the petition.

The action in the Court of Claims was brought under an act of Congress (Appendix A) authorizing the petitioners, on their own behalf, and on behalf of all Cherokee citizens enrolled for allotment as of September 1, 1902, to determine the validity of any acts of Congress passed since July 1, 1902 (Appendix B), so far as such acts seek to increase the number of persons entitled to share in the final distribution of the lands and funds of the Cherokees, beyond the number provided for in the original allotment act of July 1, 1902.

This jurisdictional act provided also an appeal to this court (Rec., 22).

The act of July 1, 1902 (32 Stat. L., 716, sec. 26), which may be called the allotment act, applicable solely to the Cherokees, provided that the final roll of the Cherokees should be made as of September 1, 1902, and that none who should die before, and none who should be born after, that date should be entitled to enrollment or to participation in the distribution of the tribal property (sec. 26, Rec., 21). The roll thus prepared was to be approved by the Secretary of the Interior, and to persons so enrolled allotments of land were to be made, patents therefor issued, and the funds in the United States Treasury distributed pro rata (secs. 66, 67, Rec., 4). By the acceptance of a patent for the lands allotted to him, the allottee was declared to assent to the allotment and the conveyance of all other lands allotted to enrolled Cherokees, and to relinquish all his right, title, and interest in the same. This provision as to relinquishment did not extend to the allottee's interest in the lands specifically reserved from allotment, or their proceeds, nor to any other of the lands except those actually allotted in accordance with the act (sec. 60, Rec., 3).

The lands reserved from allotment comprise those upon which the public buildings of the former Cherokee Nation had been erected, or to which some public interest attached, as, for instance, the Capitol, printing office, schools, insane and orphan asylums and town sites (sec. 24).

As to the tribal funds, the Secretary of the Interior was, after paying the tribal indebtedness, to distribute them pro rata among those enrolled in accordance with the allotment act (secs. 29, 66, and 67). This allotment act provided in terms that it was not to become effective until ratified by a majority of the legal voters of the Cherokee tribe, after which it was to be proclaimed by the Principal Chief and by the Dawes Commission. It was submitted

to a popular vote, ratified by a majority and duly proclaimed (Finding VII, Rec. 20).

Proceeding under the authority of the act, the roll was prepared, containing the names of 37,561 persons, to whom allotments of land were duly made and patents issued. After making these allotments there yet remain lands sufficient to provide about 3,800 allotments, worth $2,500,000, and of the funds in the Treasury about $2,000,000 remain undistributed (Finding VIII, Rec. 21).

The appellants, Muskrat and Dick, were duly enrolled under the act, and have received their allotments of land (stipulation).

On April 26, 1906 (Appendix A), Congress passed an act (34 Stat. L., 137), authorizing the enrollment of minor children living on March 4, 1906, born to parents of the Five Civilized Tribes who had been previously enrolled as members of the several tribes. Notwithstanding the inclusion of minor children of Cherokee parents by the terms of this latter act, there was a proviso that applications for enrollment should not be received from any person where the date for filing applications had been fixed by agreement between his tribe and the United States; and, the date for determining the filing of applications having been fixed by agreement with the Cherokees as October 31, 1902, the Cherokees were, therefore, exempted from the operation of the act. But by an act of June 21, 1906 (34 Stat., 325), this act was amended so as to repeal this proviso and to make the act of April 26, 1906, in this particular, apply also to the Cherokees; so that the act of April 26, 1906, as amended by the act of June 21, 1906, provides for the enrollment of minor children born to enrolled Cherokees after September 1, 1902, and for allotment to them out of the lands remaining subject to allotment (Finding IX, Rec., 21). It is further provided by this act that if there be not lands sufficient to allot all Cherokees who had been, or should be, enrolled, then each person not receiving

an allotment of land shall be paid double the value thereof out of the Cherokee fund in the United States Treasury (sec. 2). The value of an allotment had been previously fixed by the Dawes Commission, under the authority of the original allotment act, at $325.60 (Finding VIII, Rec., 21). Proceeding under this act of April 26, 1906, as amended, the Secretary of the Interior enrolled 5,610 minor children born after September 1, 1902, and living March 4, 1906 (Finding IX, Rec., 21). This number largely exceeds the number of allotments, 3,800, so that more than 1,800 of these minor children will, if the act be sustained, receive $651.20 each out of the funds in the Treasury.

The appellants assert that under the original allotment act all Cherokees living on September 1, 1902, and enrolled as of that date, became vested, as individuals, with indefeasible estates of inheritance, share and share alike, in and to all the Cherokee funds which were then in, or should thereafter come into, the United States Treasury, less such amounts as should be paid out under the authority of said act, and in and to all the Cherokee lands, either in kind or the proceeds thereof if thereafter sold; that the act of April 26, 1906, unamended, provided the desired administrative machinery, with authority and instructions in detail, to make physical delivery of said estates to each Cherokee enrolled as of September 1, 1902; that the act of April 26, 1906 did not provide for enrollment of Cherokee children born after September 1, 1902, but expressly to the contrary (Sec. 2, proviso); but the act of June 21, 1906, undertakes to amend section 2 of the act of April 26, 1906, by repealing the proviso which had made said section 2 inapplicable to the Cherokees, and by such act would deprive appellants and all Cherokees enrolled as of September 1, 1902, of the equivalent of 5,610 of their individual shares of said Cherokee lands and funds, without due process of law, without compensation and for private use.

Prior to the passage of the act establishing this jurisdic-

tion the petitioners, and others having like interests, instituted a suit in the Supreme Court of the District of Columbia, seeking to enjoin the Secretary of the Interior from proceeding with the allotment of lands and the payment of moneys to the minor children born after September 1, 1902. Soon afterwards Congress passed this jurisdictional act, and no further proceedings were had in the injunction suit (Finding [illegible]Rec., 22). Whereupon this suit was brought, and the Court of Claims found adversely to the petitioners, holding that the acts referred to were not violative of any provision of the Constitution. Hence this appeal.

From the findings of fact was omitted the following, which, being stipulated in the court below, is the subject of a stipulation filed in this court:

> "The petitioners are enrolled as members of the Cherokee tribe, residents of that part of the State of Oklahoma, formerly Indian Territory, and are the identical persons named in the act of Congress of March 1, 1907 (34 Stat. L., 1028), conferring jurisdiction upon this court to hear and determine this suit. They have received allotments of both homestead and surplus lands under the provisions of the allotment act of July 1, 1902" (32 Stat. L., 716).

In this statement we have omitted reference to certain findings of fact, for reasons now given:

Finding I is not a finding of fact, but a conclusion of law practically embodied in the second and third conclusions of law (Rec., 25). Findings II, III, and IV are not material, except in so far as they show that the Dawes Commission was charged with the preparation of the roll. Finding VI (Rec., 20) is stated only so far as it shows the roll to have been prepared by the Dawes Commission.

That this Commission "began making a roll of citizens of the Cherokee Nation under the act of June, 1898, and was engaged in the making of said roll" when certain other acts, including that of July 1, 1902, were passed, is mislead-

ing in the conclusion that may be drawn from it that the roll directed to be made by the act of July 1, 1902, was begun under an act passed *four years before that date,* for manifestly if the act of July 1, 1902, directed the preparation of a roll, making conditions not included in previous acts directing the preparation of rolls, proceedings toward that end must have been begun and terminated after July 1, 1902. The act of July 1, 1902, contained the condition for the first time that only those should be enrolled who were living on September 1, 1902. Other conditions prescribed by the acts directing the preparation of a roll being the same, it is a reasonable assumption that the names placed upon the roll under previous acts were transferred to the roll made under the act of July 1, 1902, if such persons were living on September 1.

The objection to Finding IX (Rec., 21) goes to the statement that the time for the completion of the final roll *"was extended or supplemented"* by permitting the enrollment of children who were minors living on March 4, 1906. The statement is misleading.

The act of July 1, 1902, fixed no time for the completion of the final roll. It fixed the date on which Cherokees must be living in order to be enrolled, namely, September 1, 1902, and it fixed the date after which applications for enrollment would not be received, namely, October 31, 1902.

The act of April 26, 1906, made applicable to the Cherokees by the act of June 21, 1906, did not have in contemplation those persons who were entitled to be enrolled as of September 1, 1902. It provided for minor children not enrolled as of September 1, 1902, who should be living on March 4, 1906; and it fixed a time in which the Secretary of the Interior should complete the making of the actual roll of such minor children, namely, March 4, 1907. It in nowise sought to "extend" or "supplement" the roll of September 1, 1902.

The objection to findings XI, XII, and XIII (Rec., 23, 24) is that they are immaterial in the ultimate fact they

seek to establish, namely, that the enrollment of children born after September 1, 1902, and living on March 4, 1906, was procured by the Cherokee national authorities. These findings will, however, be discussed in the brief.

Objection is made to the last paragraph of finding XV (Rec., 25), in that it omits one very significant provision of the act of April 26, 1906, respecting the continuance of the tribal government, which provision is of course open for this court to read. That provision is that the tribal existence of the Cherokees is continued in full force and effect "*for all purposes authorized by law* until otherwise provided by law." The finding omits the words italicised in the foregoing sentence.

Upon these findings the court decided, as conclusions of law, that when the original allotment act was passed, the petitioners and all other members of the Cherokee Nation of Indians were citizens of the United States, as also are the children subsequently born to them; that the Cherokee Nation is and always has been recognized by the United States as a distinct political community, subject only to the paramount authority of the United States; that the tribe and present tribal government of the Cherokee Nation were existing when the acts of April 26 and June 21, 1906, were passed; that no citizen of the Cherokee Nation has any vested interest in its unallotted lands or its undistributed funds; that section 2 of the act of April 26 was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation, as instructed by the National Council of the Cherokee Nation, with the approval of the President of the United States, as shown in the findings XI, XII, and XIII (to which we have hereinbefore referred as immaterial to the issues); that Congress has plenary power to administer upon the tribal property of the Cherokee Nation, and that the courts may not interfere with such administration; that the provision of the acts authorizing the

enrollment of minor children born after September 1, 1902, and living on March 4, 1906, is not repugnant to the constitution, and that minor children so enrolled are entitled to participate in the allotment of lands and the distribution of funds, in the same manner, and to the same extent, as Cherokee citizens enrolled under previous acts of 1898, 1900, and 1902 (Rec., 25, 26).

Specification of Errors.

The Court of Claims erred—

1. In its conclusion of law (3) that the Cherokee tribe and the present tribal government of the Cherokee Nation were existing at the date of the passage of the acts of April 26 and June 21, 1906, "as set forth in finding XV";

2. In its conclusion of law (4) that no citizen of the Cherokee Nation has any vested interest in its unallotted lands or undistributed funds;

3. In its conclusion of law (5) that the legislation complained of was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation as instructed by the National Council, with the approval of the President of the United States, and is therefore valid;

4. In its conclusion of law (6) in so far as it declares the property involved in this litigation to be "the tribal property of the Cherokee Nation" over which Congress had plenary power;

5. In its conclusion of law (7) that the act of April 26, 1906, as amended, authorizing the enrollment of minor children born after September 1, 1902, and living on March

4, 1906, and their participation in the allotment of lands and distribution of Cherokee funds "in the same manner and to the same extent as Cherokee citizens enrolled under the acts of 1898, 1900, and July 1, 1902," is a valid statute.

6. In dismissing the petition.

The court further erred—

7. In the conclusion necessarily involved in the sixth conclusion of law, that if the lands and funds in question were tribal property they were held for the benefit of *a part of the tribe,* namely, the minor children born after September 1, 1902, and living on March 4, 1906, and not for all the members of the tribe who may be living when final distribution is made.

8. In not holding that the act of June 21, 1906, seeking to add to the number of Cherokees who should share in the distribution of said property, effected the taking of appellants' property without due process of law and for private use.

There are other errors consequent upon or included in these to which reference will be made in the argument.

These several formal specifications of error present for determination these questions:

1. Did the Cherokee Tribe and the Cherokee Tribal Government exist on July 1, 1902

2. If so, for what purpose was the existence of the tribe and of the tribal government continued, and what effect did such a continuance have, if any, as affecting the unallotted lands and undistributed funds?

The answer to this question will dispose of assignments one and three.

3. Did the acts of July 1, 1902 and April 26, 1906 (unamended), vest appellants with such right or title in and to all the Cherokee lands and funds as could not be taken or destroyed without due process of law?

Or, are the lands and funds not allotted or distributed tribal property over which Congress has the absolute power of disposition? Specifications 2, 4, and 5.

4. If the unallotted lands and undistributed funds are tribal property, is it within the power of Congress to distribute such property to a particular class of such tribe—the after-born children? Or must it not be distributed among all the members of the tribe? In this connection,—who are the members of the tribe? Specification 7.

5. Is not the act of June 21, 1906, repealing that provision of the act of April 26, 1906 which exempted the Cherokees from its operation, violative of the due process clause of the fifth amendment to the Constitution? Specifications 5 and 8.

The court will observe that the court below permitted the Cherokee Nation to intervene through an attorney claiming to represent them, and to oppose the contention of appellants. Objection to the intervention of the "Cherokee Nation" was duly made and overruled. We have not formally assigned the overruling of this objection as error, because it is merely incidental and does not go to the substance of the controversy. It is mentioned now, that we may demonstrate that the "Cherokee Nation" has no interest whatever in the controversy and is not entitled to any consideration. This is apparent from three conditions:

First. The act directs that the United States be made defendant and does not provide for any other defendant.

Second. The Cherokee Nation, as a government or a tribe, had ceased to exist.

Third. No interests of the "Cherokee Nation" are sought to be affected.

Fourth. It is impossible that counsel for the so-called "Cherokee Nation" can, in opposing the contention of appellants, represent the Cherokee people, since there are but 5,610 minor children, and could not be more than double this number of parents, while there are at least twenty-five thousand other Cherokees that will inevitably suffer great loss of property if the validity of this legislation be sustained.

BRIEF OF ARGUMENT.

The Cherokee Tribe and Cherokee Tribal Government had ceased to exist long before March 2, 1906. But, even so, the joint resolution of March 2, 1902, and section 28 of the act of April 26, 1906, purport to continue the existence of the tribe and of the government only for "all purposes authorized by law."

There was no law authorizing the Cherokee government to make, or to request Congress to make, such disposition of Cherokee property.

The court, in its conclusions of law on this subject, refers to its Finding of Fact XV, in which are recited the resolution of March 2, 1906, and section 28 of the act of April 26, 1906, which undertook to continue the tribal existence and the tribal government "for all purposes authorized by law" (Rec., 25). What those purposes were is easily ascertainable.

The act of June 28, 1898 (30 Stat. L., 495, 502), provides, in its 19th section, "that no payment of moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payment of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual," etc.

By section 28 of the same act (page 504) it is provided that on the first day of July, 1898, all tribal courts in Indian Territory shall be abolished, and no officer in said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be trans-

ferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit.

By section 26, p. 504, of the same act it is provided:

> "That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

By the act of March 3, 1901 (31 Stat. L., 1058, 1077), it is declared:

> "That no act, ordinance, or resolution of the Creek or Cherokee tribes, except for adjournment, shall be of any validity *until approved by the President of the United States.*"

We submit that by these several statutes the following results were accomplished:

First. The incapacity of the tribe to receive or disburse any funds, thus dispensing with the Cherokee national treasury.

Second. The abolishment of the Cherokee courts, thus destroying its judiciary and its constabulary.

Third. The destruction of the Cherokee code of laws, by the provision that none of them should be enforced by the courts of the United States in the Indian Territory.

The Cherokee courts having been abolished and the courts of the United States forbidden to enforce Cherokee laws, this necessarily destroyed all Cherokee laws theretofore passed, and at the same time Congress forbade the Cherokee government to pass further laws.

With the council limited to the passage of resolutions, which should not become effective except upon and until the approval of the President, practically nothing was left of the Cherokee government after June 28, 1898, but its executive,

and his term of office expired prior to July 1, 1902, after which there was no law for his re-election.

In this connection we again have evidence of the resolute purpose of Congress to deny any legislative power to the Cherokee council in the first provision of section 28 of the very act we are now considering (April 26, 1906):

> "That no act, ordinance or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity *until approved by the President of the United States.*"

Of course, it is patent error in adjudging "continued existence" of a so-called tribe and its government not to have stated these limitations. With such limitations in mind, the court could not logically have reached its fifth conclusion of law, which indeed seems more properly classified as a finding of fact and should be thus considered in connection with the proposition now being maintained:

Even if a self-constituted Cherokee Council had sought the legislation now complained of through duly accredited representatives, such action would have been without authority, since there was no existing law to authorize legislation of that character, and therefore no power could be conferred thereby upon Congress to deprive appellants of their property without due process of law.

Certainly that part of this conclusion which states that the legislation was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation, as instructed by the National Council, is a statement of an alleged fact. If evidence as to the existence or nonexistence of this fact is before the court, the correctness of the finding may be inquired into. Such evidence is before

the court in the act of April 26, 1906. *That act specifically exempts the Cherokees from the operation of these provisions* in the last proviso but one to section 2, being in these words:

> "That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe, where the date for filing application has been fixed by agreement between said tribe and the United States."

The act of July 1, 1902, when ratified by the popular vote of the Cherokees, "fixed by agreement" the limit for the date of filing application as October 31, 1902 (section 30). Therefore the act of April 26, 1906, denied the very thing which the court finds the Cherokee council, through its "duly accredited representatives," sought to secure, namely, the participation by Cherokee minors born after September 1, 1902, in the allotment and distribution of the communal lands and funds. It was not until June 21, 1906, that this exemption was withdrawn and Cherokee minors born after September 1, 1902 given the right of allotment and distribution.

At this point we wish to make clear to the court that these appellants have no objection whatever to the act of April 26, 1906, *standing alone,* for, as shown, it specifically exempts the Cherokees from the operation of the provision establishing a new class of persons to be provided for out of the remaining lands and funds. Beyond this it recognizes and reaffirms the act of July 1, 1902, in providing in detail the machinery for carrying into final effect the provisions of the allotment act. It does this by directing the Secretary of the Interior to proceed with the sale of the residue of the land, to add the proceeds to the Cherokee fund, and directs its distribution among the persons with whom the agreement of July 1, 1902, was made. And this direction will be the sole authority, under which the Secretary may hereafter sell the unallotted lands.

The mischief is accomplished by the act of June 21, 1906,

which would make section 2 of the act of April 26, 1906, applicable to the Cherokees, and in that way would repeal so much of the act of July 1, 1902, as had by agreement among them terminated their community on September 1, 1902, and changed the communal ownership of the property.

Whether the act of June 21, 1906, making section 2 applicable to the Cherokees was craftily or cunningly procured by representatives of less than one-third of the enrolled Cherokees, is only matter for conjecture. Certainly, there is nothing to show any agreement between the Cherokees and Congress which led to this amendment.

Just what power a petition of the "Cherokee Nation" could have conferred upon Congress the court does not declare; but as it deemed this conclusion of sufficient importance to announce it, it must be that the court found, as a legal proposition, that the self-constituted officers of the so-called Cherokee Nation had the authority to surrender whatever rights its former members had acquired in the former tribal property, even though Congress might not itself have accomplished that end. For such authority we look in vain.

The former members of the Cherokee Nation were citizens of the United States when this resolution was passed, and were under the protection of the Federal Constitution. They owed no allegiance to the Cherokee tribe because it was no longer a tribe to compel obedience; were subject to none of its laws, for there were none; could not involve its protection, for it could not protect. Incapable of legislation which would surrender the rights of its former members, certainly no self-constituted government could accomplish that purpose by a mere resolution. Unable to protect them, it was equally powerless to burden them. Unable itself to effect any change in the status of its former members, to confer rights upon them or deprive them of any rights, it certainly could not, by resolution, authorize Congress to take or destroy their property.

And independently of the limitations upon the legislative power of the Cherokee government—as the act of July 1, 1902 (section 25) imposed a limitation as to who should be enrolled, and as this was accepted by the popular vote of the Cherokee people, there would have been no power in the Cherokee National Council to make any further request in the premises, or to reverse the result of the popular vote, had such council's legal existence continued. The action of the so-called Cherokee National Council, by the resolution of 1905, could not affect the right of distribution of the common property provided for by the act of July 1, 1902, so as to make the subsequent legislation valid by agreement so far as the admission of a new and different class of people is concerned, unless it appear that all persons entitled were individually parties to that agreement and were competent to contract. The inequalities which would immediately result from the admission of third parties, would so change the nature of the absolute title conferred, that no matter what power the National Council of the Cherokees once had, in this regard, such authority could not exist after the whole Cherokee people had acted pursuant to the law of Congress and had accepted the rights conferred.

Let us see into what further error the court was led in this connection. This fifth conclusion (or finding) states that the President approved this resolution. That is true, but that approval had not been given when the "duly accredited representatives" of the Cherokee Nation presented the petition to Congress; nor when the acts of April 26, 1906, and June 21, 1906, were passed; nor was it given *until five months after this suit was brought* (Finding XII, Rec., 24). The fact is that the resolution was passed on September 28, 1905, and that on August 17, 1907, almost two years after the passage of the resolution, the approval of the President of the United States was secured. The attorney for the Cherokee Nation who appeared by intervention in this case, evidently discovered that the commission which claimed to have been

acting for the Cherokees, and to have requested the enactment of the legislation now complained of, had acted under a resolution which conferred no authority whatever upon them, and sought to cure the defect in their authority by this belated approval of the President. Now the law applicable to tribal government declares—

> "that no act, ordinance or resolution of the Creek or Cherokee tribes except for adjournment, shall be of any validity *until* approved by the President of the United States."

It would seem, therefore, that these "accredited representatives" were proceeding without authority when they besought Congress to do this most unnatural thing. That it was unnatural is apparent, when we consider that there were 37,561 persons originally enrolled; that the majority of these must have been minors of tender years; that there were but 5,610 children born after September 1, 1902, and living on March 4, 1906; that their parents, if living, could not have exceeded twice that number, being 11,220 persons, and that there are therefore at least 26,341 persons originally enrolled who have no children enrolled under the later act. Upon the assumption that the red man is as selfish as his white brother, it is a fair conclusion that more than two-thirds of the Cherokees were opposed to the law which took away their rights and gave them to others in whom they had no interest. As this court once said:

> "Some things lie too deep in the common sense and common honesty of mankind to require argument or authority to support them."

We have submitted that the tribal government, even if it had continued could not authorize Congress to do what it might otherwise have lacked the power to do. Is it not now plain that this petition of its "duly accredited representatives" could not have represented the wishes or the interests of a

very large majority of the Cherokee people? Upon this point it is well worth while to quote from the opinion of Judge Howry, of the court below:

> "The findings which show the methods employed to obtain the action of Congress are immaterial, because in section 2 of the amendments to article I of the Constitution of the Cherokee Nation, the character of the title to the lands of the nation had been changed. That section provided that the lands of the Nation should remain common property, that is, common property of the Nation for the benefit of the tribe, until the National Council should request the survey and allotment of the same in accordance with the provisions of article XX of the treaty of the nineteenth of July, 1866, between the United States and the Cherokee Nation. The National Council had already requested the survey and allotment of the lands in accordance with that treaty, and the request (having been submitted to the Cherokee people under a law of Congress to carry out treaties) had been ratified, and the then existing controversy respecting the affairs of the tribe, had been closed by a decision of this court which was duly affirmed by the Supreme Court in the Cherokee intermarriage cases (203 U. S., 93). Section 25 of the act of July 1, 1902, which imposed a limitation as to who should be enrolled, exhausted the power of the Cherokee National Council to make any further request in the premises. So any subsequent action of the council seeking to reverse the popular vote has nothing to do with this case" (Rec., 39).

But of what avail is a discussion of the character of the tribal government? Suppose the tribe and the government still existed with its original powers. Upon what principle could the National Council annul the result of the popular vote, and, by an unrepresentative and partisan majority of its delegates, sport away the rights of the members of the tribe which had been fixed by agreement between them and the United States?

We conclude our consideration of this subject with the suggestion that if the alleged continuance of the tribal government by the resolution of March 2, 1906, and the act of April 26, 1906, attempted to give to that government the power to authorize Congress by resolution to take property of these appellants without due process of law, such resolution and act of continuance are themselves subject to the same constitutional objections.

The property remaining unallotted (and not specifically reserved from allotment) and the undistributed fund, were not tribal property, but by the act of July 1, 1902, all right, title, and interest in all the lands and all the funds became vested in those Cherokees who were enrolled as of September 1, 1902.

This proposition invites attention to our second, fourth, and fifth assignments of error, which allege that the fourth, sixth, and seventh conclusions of law made by the court are erroneous. They may be advantageously considered together.

In the case of Brown & Gritts *vs.* The United States, No. 331, which has been recently heard by this honorable court, the appellants' brief discusses fully the character of the title enjoyed by the Cherokees. To the argument therein made we beg to refer in support of the ultimate statement that when the act of July 1, 1902, became effective with its ratification by the Cherokees, the former community was forever terminated, since by its terms no Cherokee not in being on September 1, 1902, could share in the former communal property.

It is of the very essence of a community that the rights of a member who dies perish with him, and that one born into a community immediately acquires a member's rights. But under the act of July 1, 1902, it was provided that if a Cherokee died after September 1, 1902, his rights should de-

scend to his heirs; if one should be born after that date, he was to take nothing but a right of inheritance, and this right of inheritance extended, not only to allotments of land, *but also to the deceased allottee's proportionate share of other tribal property, from whom he inherited.*

The community, therefore, having been dissolved, and the allottees being capable of transmitting to their heirs, not merely the lands allotted to them, but also their proportionate share of the other tribal property, the title to all the former property of the community must have vested in those enrolled individuals who comprised it at the moment of its dissolution, September 1, 1902. If such be the case, those individuals became the owners in common of all the property. Congress must have so considered their ownership; otherwise, why was it written into the act that any allottee accepting his patent should be "deemed to assent to the allotment and conveyance of the lands of the tribe" to other allottees, and to relinquish his title to the same (that is, to other allotments made to enrolled Cherokees) except in the proceeds of lands reserved from allotment? Otherwise, why was it provided in section 20 of the act of July 1, 1902, that an allottee's lands "with his proportionate share of other tribal property" should descend to his heirs? Otherwise, why was it written in the act of April 26, 1906, that this provision as to children born after the completion of the rolls under previous acts should not apply to the Cherokees? On this point Howry (J.) in his opinion, says:

> "The Cherokee lands had been before this act of July 1, 1902, conveyed to the Cherokee Nation in fee simple (Holden *vs.* Joy, 17 Wall., 211). With the adoption of the Cherokee Constitution, the title to the common property passed from the communal owners and became vested in the nation as public lands and held by the nation in its political and corporate capacity for the whole tribe. (Eastern Cherokees *vs.* U. S., 202 U. S., p. 101). So far then as the legislation had proceeded under the treaties by the act of

> July 1, 1902 (which professed to execute the treaties) the title to the unallotted lands and funds had passed out of the Cherokee Nation and had taken on the character, as to the persons authorized to be enrolled as of September 1, 1902, of an ownership in common for the benefit of all the members of the tribe living as of September 1, 1902" (Rec., 39).

If, then, the property ceased to be tribal with the dissolution of the community, in whom did it vest? This court has said that rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as of present interest (Pearsall *vs.* R. R. Co., 161 U. S., 646-673).

In constitutional law vested rights are those which have so completely or definitively accrued to, or settled in, a person that they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the Government should recognize and protect as being lawful in themselves, and settled according to the then current rules of law, and of which the individual cannot be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare (Black's Law Dict., p. 1218).

If it was within the power of Congress to emancipate the Cherokees from the control of the United States, and to dissolve the community with the consent of its people, and to provide for the distribution of the tribal property, nothing has been left undone to accomplish precisely these conditions. Congress could emancipate them (*In re* Heff, 197 U. S., 488), and it did so by the citizenship act of March 3, 1901. Having plenary power over tribal property, as numerous decisions declare, it could provide for its distribution if the Indians were at the time in tribal relations (Lone Wolf *vs.* U. S., 187; U. S., 553, 565). If they were not in tribal relations, the same disposition of the tribal property could have been made with their consent, which was in this case

given (Cherokee Intermarriage cases, 203 U. S., 93); and if the act providing for the disposition of the property specifically declared that it should be divided among all Cherokees living on a certain day, and specifically excluded all who should die before, and all who should be born after that day, it must have vested all the property in the individual Cherokees living on that day as truly as if their names had been written in the act.

What title would have been established if the 37,561 persons afterward ascertained and enrolled had been specifically named in the act?

If any other persons or body of people had been the recipients of such a grant as was made by the act of July 1, 1902, such persons or body of people thus provided for would be tenants in common, whose rights we would call vested rights. Congress has conferred too many titles in and upon Indians to say that the rights conferred upon them by law cannot be as truly vested in the members of an Indian tribe, as in and upon anybody else within the terms of a grant, irrespective of the citizenship of those Indians receiving such rights.

A grant is complete when the terms of the grant are met. In this case the grant made by Congress raised the presumption that every prerequisite to its completion was complied with. It was neither a void nor a voidable grant, when the conditions imposed by Congress put the parties in possession of their allotments. The same persons became entitled to their share of the common funds upon the evidence of the approved rolls that they possessed the necessary qualifications. If from any cause there remain surplus lands not needed for allotment to the persons living, according to the estimates made of the number of persons entitled and the quantity of land to be allotted, and additional legislation was necessary to carry out the act granting the right, it was competent to enact such legislation; and such legislation was provided in the act of April 26, 1906, unamended, since it

provided details for the disposition of the property remaining unallotted or undistributed.

But, we submit, any legislation having the effect of giving the property or any part of it to a new class of people, is open to as much objection as to provide by another act for the allotments already made to be diminished.

The grant by the Cherokee people to the individual allottees was irrevocable.

A grant implies a contract for the grantor not to reassert the title granted (Fletcher *vs.* Peck, 6 Cr., p. 87). Even where land is once granted by a State its legislative power is incompetent to annul the grant and give the grant to another (Arredondo's case, **6 Peters, 691).**

We cannot read the act or the laws relating to the ownership of property and reach any other conclusion than that the 37,561 persons became tenants in common of all unallotted lands, (except those specifically reserved from allotment), and that each of them has a valid claim against the fund in the Treasury of the United States for his proportionate part of it (Doe *vs.* Wilson, 23 How., 457, 463). That each was entitled to a partition, in kind, of the lands was recognized by the act of July 1, 1902, which provided a method of partition and established a tribunal for making it. That each was entitled to a proportionate share in the tribal property is likewise evidenced by that provision of the act which declared that such proportionate share should be transmissible to the heirs of deceased allottees, and by the act of April 26, 1906, directing the Secretary to sell the residue of the lands and distribute the proceeds among those enrolled as of September 1, 1902.

It seems to counsel impossible to deny that, with the acceptance of this act of July 1, 1902 by the Cherokee people, the right to prospective enjoyment of *all* the lands and *all* the funds of the Cherokee Nation, became the property of the particular persons enrolled, "as of present interest."

The majority opinion of the court below, in declaring that

appellants are not vested with rights in the unallotted lands, cites some authorities to which reference must be made (Rec., pp. 28, 30). Cases are cited to show that the patent vested title in the nation and not in the individuals, and it is declared that the individuals on July 1, 1902, became the communal owners of the lands and funds—with which we are in hearty accord. But the opinion adds a statement of fact that the amount of land allotted was not determined by the Dawes Commission, but by section 11 of the act of July 1, 1902, which is not the case. That section directs the Dawes Commission to allot to the individuals *as many acres* as shall be equal in value to 110 acres of the average allottable land. By reason of difference in soil an allotment of 80 acres might have been equal in value to 110 acres of average allottable land, and for the same reason another allottee might have received 160 acres.

At this point it may be of interest to observe that if the number of Cherokees had been estimated by Congress to be 40,000 there would have been 110½ acres for each individual, as there were 4,420,000 acres to be distributed. (See findings of fact, Brown & Gritts *vs.* U. S., No. 331, Rec., 20.) As showing how Congress was able to determine that there would be about 110 acres in the average allotment, we may refer to the judgment of this honorable court in the Cherokee Intermarriage cases (203 U. S., 93), whereby a certain class of intermarried whites were directed to be stricken from the roll. We have nothing in the record to show how many were so removed from the roll; the number may not even yet be known; but as Congress very probably selected 40,000 as approximating the total number of the Cherokees, and as there are 37,561 finally enrolled, it seems highly probable that the number of white persons removed from the rolls, added to those finally enrolled, would closely approximate 40,000. And if we look at all to finding VI we have it that rolls were being prepared under the act of 1898 and for some years previous to 1902; that the Secretary of the In-

terior had fixed the very day of the passage of the allotment act, July 1, 1902, as the last day on which applications for enrollment might be filed, and that the Interior Department was therefore in position to give to Congress an accurate estimate of the number of Cherokees. But we think this is beside the question and have referred to it merely to emphasize the incorrectness of the declaration that Congress itself determined the amount of land to be allotted.

A further evidence of the purpose of Congress to allot all the lands among these enrolled persons is found in the provision specifically reserving some lands from allotment, the lands so reserved being those in which there was a public interest.

The opinion then declaring that each member of the nation became entitled by reason of the communal ownership to an equal share with his co-owners in the common property, declares that such right is not transformed into a vested right by the act of July 1, 1902, because "the right of a member dying before September 1, 1902, became extinct and passed to the tribe in general." This reason, instead of supporting, denies the conclusion; for we are not concerned with those living on July 1, 1902. The appellants are those living on September 1, 1902. It would seem that the court, in declaring the right of one who died before September 1, 1902, extinct, agreed, as we are now insisting, that the right of one living on September 1, 1902, did not become extinct with his death and that his property did not pass to the tribe in general. The rights of those dying after that date passed, by the terms of the act, to their heirs; and that there should be no question as to what rights passed, the act, in fullest terms, provides that the rights to the allotments of deceased allottees and to their "proportionate share of the tribal property" shall descend to the heirs (sec. 20, Rec., 4).

We earnestly submit that by such provisions in the act of July 1, 1902, the community was to terminate on September 1, 1902, and that, the Cherokees assenting to this, it

did terminate on that day. Prior to that date probably no one could assert a vested interest because he might die before that date; but on that date rights must have vested in those then living, who are the appellants here, if the combined action of Congress and the Cherokee people could ever have vested them.

The court below thought that the certificate of allotment, being conclusive evidence of the right of the allottee to his allotted lands, was sufficient to support its finding that there were no vested rights in other property. But that certificate accomplished the investiture not of a right in common property, but of a fee-simple title to lands specifically designated. It destroyed the rights of all other allottees in that particular allotment, and combined them all in the individual allottee; and it left undisturbed the rights of all allottees in the property not allotted or not distributed.

It seems really a simple proposition that the requirements of the assent of all allottees to a surrender of their rights in other allotments was based upon the theory that they had vested interests in all the lands which were subject to allotment. The court below seems not to have considered the elementary proposition that there are vested interests in property held in common.

In the Massachusetts case of Drew *vs.* Carroll, 28 N. E. Rep., 148, a statute was considered which made all Indians citizens of the State, and gave the right to the Herring Pond Indians to have partition of their common land to be afterwards divided; and where a scheme of allotment was provided in the act it was held that immediately upon the conferring of citizenship upon the Indians they acquired an undivided title, right, and interest in the lands, which they could mortgage even before partition was had.

In Webster *vs.* Reid, 1 Morris, Iowa, 467, it was declared that certain half-breeds of the Sac and Fox tribes held that fee-simple title to their lands as tenants in common, and that the legislature had not the power to destroy

their rights as such tenants in common. Upon this point Judge Howry's opinion says:

> "If the act of July 1, 1902, was an agreement with the members of the Cherokee tribe, and such members were citizens of the United States, there is great force in the argument that each member of the tribe living September 1, 1902, acquired an undivided interest in the common lands, free from any right of change, because the future distribution of that property was designed to be ministerial in character; and the exercise of further plenary power on the part of the Government was not intended except for the benefit of those embraced in the ratified agreement. The further contention that when citizenship was conferred there was no tribe, is likewise of much force. * * * It is a contradiction to say that under the new legislation the rights of the allottees fixed by the act of July 1, 1902, remain the same in and to the unallotted lands, if a new class numbering 5,610 people be admitted, because the new class must necessarily absorb every piece of unallotted land, and to make this new class equal nearly all the available funds must likewise be absorbed for the benefit of the new class. Thus the rights of the former allottees are in effect superseded and are therefore no rights at all, if the Congress have the power to take land and moneys from the old class to give to the new.

Even if the allottable lands not allotted and the funds undistributed be held to be tribal property, such property must be distributed among all the members of the tribe, and not merely among one class of members (Specification 7).

The court declared all unallotted and undistributed property to be tribal, and, by its dismissal of the petition, necessarily adjudged that it was distributable only among the 5,610 children born after September 1, 1902.

If the community of the Cherokees did not terminate, as we have insisted, on September 1, 1902, it was not terminated on March 4, 1906. It is not yet terminated, and it will not terminate until the final distribution of the tribal property. If the act of July 1, 1902, did not put an end to the community on September 1, 1902, certainly it did not accomplish the end by the act of April 26, 1906, as amended, for, manifestly, the power to add a class of Cherokees born after September 1, 1902, admits the power to again set the date forward, and again and again, until the last foot of land and the last dollar in money promised to those living on September 1, 1902, has been given away to other persons. As in the court's view there still remain assets of the community, there is still a community of persons among whom they are to be divided. This judgment excludes from that community those 37,561 persons enrolled as of September 1, 1902, and declares that the community is comprised *only* of those 5,610 enrolled minors born after that date and living on March 4, 1906.

After making allotments or money payments to these 5610 persons, there will still remain assets, which, if this decision of the court be correct, are tribal. If Congress should today enact that the remaining assets be divided among persons born after March 4, 1906, such persons would, if this judgment is correct, be the community to the exclusion of all others. Thus, by the mere act of allotment, the individual goes out of the community, leaving no "proportionate share of the tribal property" to descend to his heirs. This being so, if Congress does not provide for the distribution of the remaining million dollars to still another class of persons, those previously enrolled being no longer members of the community, what shall be done with that million dollars of tribal property?

But the individuals did not go out of the community with their allotment. Congress recognized this in the act of April, 1906, when it provided that the assets remaining

after making allotments should be divided pro rata *among all the enrolled persons.* In holding, therefore, that the act of July 1, 1902, did not vest the persons enrolled under that act with interests in all the property, the Court of Claims declared the property remaining unallotted and undistributed to be tribal in its character, but adjudged not a tribal distribution in which all members should share alike, but the distribution of a large amount of tribal property among a certain class of members of the tribe, namely, certain children born since September 1, 1902.

Granting the right of Congress to extend the existence of the community, granting that the property is still tribal, is it not evident that it must be divided among all the members of the community as it exists when the division is made?

It will result that if the lands and funds not allotted or not distributed among those enrolled as of September 1, 1902, are now tribal property, it must be distributed as well to those first enrolled (if still living) as among those enrolled as of March 4, 1906 (if still living) and those living on the date when the property shall lose its tribal character.

The answer to all of which is that the community no longer exists and the remaining property is not tribal, and was not tribal after September 1, 1902.

We have referred with some frequency and much comfort, to the separate opinion of Judge Howry, of the court below, which concurs in large measure, and with admirable argument, in practically all the propositions advanced by appellants; and in so far as it does so, is rather a dissenting than a concurring opinion. His concurrence in the result reached by the court is based only on a doubt growing out of the interpretation to be given to what this honorable court has said with respect to what is, or what may not be, tribal property (Rec., 45).

Let us briefly consider, then, what this court has said upon that subject.

In the case of the Cherokee trust funds (117 U. S., 288) the court was considering the right of certain Cherokee Indians living in the East to certain funds held in trust by the United States for the Cherokee Nation. The judgment was that the lands from the sales of which the proceeds were derived, belonged to the Cherokee Nation for the common benefit of all Cherokees—which of course did not mean that each individual had an interest as a tenant in common (p. 308).

In the case of The Cherokee Nation *vs.* Journeycake, 155 U. S., 196, 207, the opinion referring to the patent issued to the Cherokees declares that whatever of title was conveyed, was conveyed to the Cherokees as a nation, and did not vest in severalty in the individuals. The appellants have no cause of complaint of either of these opinions. On the contrary, they ask attention to the declaration in the opinion just cited in these words:

> The Constitution of the Cherokee Nation, both as originally adopted in 1839 and as amended in 1866, declares in article 1, section 2, that "the lands of the Cherokee Nation shall remain common property," and *while the amendment contemplates a time at which these lands shall cease to be common property,* it is only when, by article 20 of the treaty of 1866, the National Council shall request that they be surveyed and allotted in severalty to the Cherokees.

We italicize the words in this citation to emphasize the suggestion that the contemplated time has been reached when the lands are no longer common property.

In Cherokee Nation *vs.* Hitchcock (187 U. S., 294-307), the court was considering the authority of Congress respecting the leasing of mineral and oil lands, at a time when the lands were still communal, and when the Cherokee Indians were still in tribal relations. In this opinion the court notes the appointment of the Dawes Commission and the authority given to it. It is well to repeat here that the 16th section of the act of March 3, 1893 (27 Stat. L., 645), authorizes the

appointment of Commissioners "to enter into negotiations with the Cherokee Nation * * * *for the purpose of the extinguishment of the national or tribal title* to any lands within that territory * * * *by the allotment and division of the same in severalty among the Indians.* * * *,*" from which we must gather that it was the purpose of Congress, by this very legislation under which appellants claim their rights, to put an end to the tribal holding of property. The opinion contains this statement, of importance in the present case:

> "There is no question involved in this case *as to the taking of property;* the authority which it is proposed to exercise by virtue of the act of 1898 has relation merely to the control and development of *the tribal property,* which still remains subject to administrative control of the Government."

In the case of Lone Wolf *vs.* Hitchcock (187 U. S., 553-565), the ultimate decision was that, as, when the act to dispose of the Kiowa and Comanche lands was passed, the Indians were *in tribal relations,* and the act purported to give an *adequate consideration* for the surplus lands not allotted among the Indians, or reserved for their benefit, the power of Congress was not to be denied. Another reason given by the court was that the title to the Kiowa and Comanche lands was held by the United States, and it was said that the contention of the Indians ignores the status of the contracting parties and the relation of dependency they bore toward the government of the United States. The court refers to the case of U. S. *vs.* Kagama (118 U. S., 375), and cites the following from the opinion:

> "It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the Nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States and receive from them no protection."

And for these reasons we have a line of decisions upholding the power of Congress to deal with the persons of Indians in tribal relation, respecting their tribal property. But this reasoning is totally inapplicable to the case at bar. These appellants, when the legislation they now complain of was enacted, were *not* the wards of the nation; were *not* communities dependent on the United States for daily food or for political rights.

That the Lone Wolf decision was not intended to apply to any but tribal Indians, or to any but tribal property, is not only perfectly plain from its own language, but, as well, from the citation of previous decisions. For instance, the opinion in the case of the Choctaw Nation (119 U. S., 1, 27), wherein it was declared that Indians who had not been fully emancipated from the control and protection of the United States, are subject, *at least so far as the tribal lands are concerned,* to be controlled by direct legislation of Congress.

It would seem, therefore, that this decision cannot be accepted as a foundation for any doubt as to the persons and character of the property over whom, or over which, the court declared Congress to have plenary power.

In the Heff case (*supra*) the relator had been convicted of the sale of liquor to a Kickapoo Indian who had become under the law a citizen of the United States. The contention of the prosecution was that, notwithstanding the elevation of the Indian to citizenship, it was, nevertheless, unlawful to sell liquor to him. This court said:

> "But the logic of this argument implies that the United States can never release itself from the obligation of guardianship; that so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national, and therefore, State, citizenship, the benefits and burdens of the laws of the State may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the State, and release him from obligations of

> obedience to it. Can it be that because one has Indian, and only Indian, blood, in his veins, he is to be forever one of a special class over whom the General Government may, in its discretion, assume the rights of guardianship which it has once abandoned, and this, whether the State or the individual himself consents? We think the reach to which this argument goes, demonstrates that it is unsound."

This familiar case has very recently received again consideration by this honorable court in the case of U. S. *vs.* Celestine, 215 U. S., 278. This also was a criminal case, the question being whether of a homicide, committed upon the reservation of a tribe to which the defendant formerly belonged, the United States courts had jurisdiction. The opinion sustained the jurisdiction of the United States court, for, notwithstanding the defendant had been made a citizen of the United States, the offense was committed within the limits of an Indian reservation over which the Federal courts had exclusive jurisdiction. In the opinion it is said that in the absence of a subjection in terms of the individual Indian to State laws, and denial of further jurisdiction over him by the United States, a statute will not be construed as a renunciation of jurisdiction by the United States of crimes committed by Indians against Indians *on Indian reservations.* The opinion notes that the plea to the jurisdiction of the Federal court "does not challenge the continued tribal organization of the Tulalip Indians, or question that the tribe, as well as the general body of * * * the reservation, continues under the general care of the United States." The two cases are clearly distinguished.

It will be observed that in none of these cases wherein the court upheld the power or competency of Congress to pass laws respecting the lands of an Indian, do the decisions apply to any other lands than those which were *tribal.* And none of them countenance the suggestion that after the tribal character of the lands has been changed, the power of Congress is yet continued over them merely because the owners,

citizens of the United States, are of Indian blood. And in none of them had there been the *taking* of property, except in the Lone Wolf case where such taking was justified because the Indians were *tribal,* the property was *tribal,* the United States was the trustee, and *adequate compensation was provided.*

Recalling that when the things complained of were done, the appellants were citizens of the United States, subject to its laws alone, and entitled to its protection; that their former community had been dissolved by their popular vote, at the instance of Congress; that they rested upon the promise of the Government guaranteeing that they, and they only, should have the lands and funds of the Cherokees, we submit that there are no decisions of this court which permit a doubt that the power of Congress over Indians and Indian lands extends only to tribal Indians and tribal lands; that even as to such lands, the power given to Congress is the power to develop, conserve and protect, by wise administration,—not in utter disregard of the promises it has made and the rights with which it has vested and adorned the Indians, to take away and destroy.

For the reason that Congress has exceeded its power, sought to annul its guaranty, and to deprive a class of citizens of rights which could never be denied to any other class, we submit that the judgment of the Court of Claims should be reversed.

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FRANK J. BOUDINOT,
Attorneys for Appellants.

APPENDIX A.

The Jurisdictional Act, March 1, 1907.

[34 Stat. L., 1015.]

That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled "An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine and adjudicate each of said suits.

The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.

Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of the said acts, authorized to be

brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two.

APPENDIX B.

Cherokee Allotment Act, July 1, 1902.

[32 Statutes at Large, 716.]

An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of the town sites therein, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DEFINITION OF WORDS EMPLOYED HEREIN.

SEC. 4. The word "minor" shall be held to mean males under the age of twenty-one years and females under the age of eighteen years.

SEC. 5. The terms "allottable lands" or "lands allottable" shall be held to mean all the lands of the Cherokee tribe not herein reserved from allotment.

SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

SEC. 12. For the purpose of making allotments and designating homesteads hereunder, the forty-acre, or quarter

of a quarter section, subdivision established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

SEC. 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said Commission to make said selection and designation.

SEC. 17. In the making of allotments and in the designation of homesteads for members of said tribe, said Commission shall not be required to divide lands into tracts of less than the smallest legal subdivision provided for in section twelve hereof.

SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided,*

That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

SEC. 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

SEC. 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands. . . .

RESERVATIONS.

SEC. 24. The following lands shall be reserved from the allotment of lands herein provided for:

(a) All lands set apart for town sites by the provisions of the act of Congress of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), the provisions of the act of Congress of May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), and by the provisions of this act.

(b) All lands to which, upon the date of the ratification of this act, any railroad company may, under any treaty or act of Congress, have a vested right for right of way, depots, station grounds, water stations, stock yards, or similar uses only, connected with the maintenance and operation of the railroad.

(c) All lands selected for town cemeteries not to exceed twenty acres each.

(d) One acre of land for each Cherokee schoolhouse not included in town sites or herein otherwise provided for.

(e) Four acres for Willie Halsell College at Vinita.

(f) Four acres for Baptist Mission school at Tahlequah.

(g) Four acres for Presbyterian school at Tahlequah.

(h) Four acres for Park Hill Mission school south of Tahlequah.

(i) Four acres for Elm Spring Mission school at Barren Fork.

(j) Four acres for Dwight Mission school at Sallisaw.

(k) Four acres for Shiatook Mission, near Skiatook.

(l) Four acres for Lutheran Mission school on Illinois River north of Tahlequah.

(m) Sufficient ground for burial purposes where neighborhood cemeteries are now located, not to exceed three acres each.

(n) One acre for each church house outside of towns.

(o) The square now occupied by the capitol building at Tahlequah.

(p) The grounds now occupied by the national jail at Tahlequah.

(q) The grounds now occupied by the Cherokee Advocate printing office at Tahlequah.

(r) Forty acres for the Cherokee Male Seminary near Tahlequah.

(s) Forty acres for the Cherokee Female Seminary at Tahlequah.

(t) One hundred and twenty acres for the Cherokee Orphan Asylum on Grand River.

(u) Forty acres for colored high school in Tahlequah district.

(v) Forty acres for the Cherokee Insane Asylum.

(w) Four acres for the school for blind, deaf, and dumb children near Fort Gibson.

The acre so reserved for any church or school-house in any quarter section of land shall be located where practicable in a corner of such quarter section adjacent to the section lines thereof.

ROLL OF CITIZENSHIP.

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day

of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any

manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: *Provided,* That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of any one on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

TITLES.

SEC. 58. The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title, and interest, of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate.

SEC. 59. All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent.

SEC. 60. Any allottee accepting such patent shall be deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in this act, and to relinquish all his right, title, and interest to the same, except in the proceeds of lands reserved from allotment.

SEC. 61. The acceptance of patents for minors and incompetents by persons authorized to select their allotments for them shall be deemed sufficient to bind such minors and incompetents as to the conveyance of all other lands of the tribe.

SEC. 62. All patents, when so executed and approved, shall be filed in the office of the Dawes Commission, and recorded in a book provided for the purpose, until such time as Congress shall make other suitable provision for record of land titles, without expense to the grantee, and such records shall have like effect as other public records.

MISCELLANEOUS.

SEC. 63. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

SEC. 64. The collection of all revenues of whatsoever character belonging to the tribe shall be made by an officer appointed by the Secretary of the Interior, under rules and regulations to be prescribed by the said Secretary.

SEC. 65. All things necessary to carry into effect the provisions of this act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior.

SEC. 66. All funds of the tribe, and all moneys accruing under the provisions of this act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior.

SEC. 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable and he shall

make all needed rules and regulations to carry this provision into effect.

SEC. 69. After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee tribe as provided in this act, no contest shall be instituted against such selection, and as early thereafter as practicable patent shall issue therefor.

SEC. 70. Allotments may be selected and homesteads designated for minors by the father or mother, if citizens, or by a guardian, or curator, or the administrator having charge of their estate, in the order named; and for prisoners, convicts, aged and infirm persons, and soldiers and sailors of the United States on duty outside of the Indian Territory, by duly appointed agents under power of attorney; and for incompetents by guardians, curators, or other suitable persons akin to them; but it shall be the duty of said Commission to see that said selections are made for the best interests of such parties.

SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands.

SEC. 73. The provisions of section thirteen of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall not apply to or in any manner affect the lands or other

property of said tribe, and no act of Congress or treaty provision inconsistent with this agreement shall be in force in said nation except sections fourteen and twenty-seven of said last-mentioned act, which shall continue in force as if this agreement had not been made.

SEC. 74. This act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following:

SEC. 75. The principal chief shall, within ten days after the passage of this act by Congress, make public proclamation that the same shall be voted upon at a special election to be held for that purpose within thirty days thereafter, on a certain date therein named, and he shall appoint such officers and make such other provisions as may be necessary for holding such election. The votes cast at such election shall be forthwith duly certified as required by Cherokee law, and the votes shall be counted by the Cherokee national council, if then in session, and if not in session the principal chief shall convene an extraordinary session for the purpose, in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief shall jointly make certificate thereof and proclamation of the result and transmit the same to the President of the United States.

Approved by President, July 1, 1902.

Ratified by Cherokee people, August 7, 1902.

Proclaimed by Tams Bixby, acting chairman Commission to the Five Civilized Tribes, and T. M. Buffington, Principal Chief, Cherokee Nation, August 12, 1902.

APPENDIX C.

Act of April 26, 1906.

[34 Stat., 137.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That after the approval of this act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee,

Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of this act, in which cases such motion shall be made within sixty days after the passage of this act: *Provided*, That the Secretary of the Interior may enroll persons whose names appear upon any of the tribal rolls and for whom the records in charge of the Commissioner to the Five Civilized Tribes show application was made prior to December first, nineteen hundred and five, and which was not allowed solely because not made within the time prescribed by law.

SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and reënacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this act as to allotments heretofore made, no contest shall be instituted against such allotment: *Provided*, That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day

of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further,* That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided,* That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States.

* * * * * * *

SEC. 6. That if the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the President of the United States, or if any such executive become permanently disabled, the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability or death of the incumbent, by appointment of a citizen by blood of the tribe.

If any such executive shall fail, refuse or neglect, for thirty days after notice that any instrument is ready for his signature, to appear at a place to be designated by the Secretary of the Interior and execute the same, such instrument may be approved by the Secretary of the Interior without such execution, and when so approved and recorded shall convey legal title, and such approval shall be conclusive evidence that such executive or chief refused or neglected after notice to execute such instrument.

Provided, That the principal chief of the Seminole Nation is hereby authorized to execute the deeds to allottees in the Seminole Nation prior to the time when the Seminole government shall cease to exist.

* * * * * * *

SEC. 10. That the Secretary of the Interior is hereby authorized and directed to assume control and direction of the schools in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, with the lands and all school property pertaining thereto, March fifth, nineteen hundred and six, and to conduct such schools under rules and regulations to be prescribed by him, retaining tribal educational officers, subject to dismissal by the Secretary of the Interior, and the

present system so far as practicable, until such time as a public school system shall have been established under Territorial or State government, and proper provision made thereunder for the education of the Indian children of said tribes, and he is hereby authorized and directed to set aside a sufficient amount of any funds, invested or otherwise, in the Treasury of the United States, belonging to said tribes, including the royalties on coal and asphalt in the Choctaw and Chickasaw nations, to defray all the necessary expenses of said schools, using, however, only such portion of said funds of each tribe as may be requisite for the schools of that tribe, not exceeding in any one year for the respective tribes the amount expended for the scholastic year ending June thirtieth, nineteen hundred and five; and he is further authorized and directed to use the remainder, if any, of the funds appropriated by the Act of Congress approved March third, nineteen hundred and five, "for the maintenance, strengthening, and enlarging of the tribal schools of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole nations," unexpended March fourth, nineteen hundred and six, including such fees as have accrued or may hereafter accrue under the Act of Congress approved February nineteenth, nineteen hundred and three, Statutes at Large, volume thirty-two, page eight hundred and forty-one, which fees are hereby appropriated, in continuing such schools as may have been established, and in establishing such new schools as he may direct, and any of the tribal funds so set aside remaining unexpended when a public school system under a future State or Territorial government has been established, shall be distributed per capita among the citizens of the nations, in the same manner as other funds.

SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be pre-

sented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: *Provided,* That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundred and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded.

Upon dissolution of the tribal governments, every officer, member, or representative of said tribes, respectively, having in his possession, custody, or control any money or other property of any tribe shall make full and true account and report thereof to the Secretary of the Interior, and shall pay all money of the tribe in his possession, custody, or control, and shall deliver all other tribal property so held by him, to the Secretary of the Interior, and if any person shall willfully and fraudulently fail to account for all such money and property so held by him, or to pay and deliver the same as herein provided for sixty days from dissolution of the tribal government, he shall be deemed guilty of embezzlement and upon conviction thereof shall be punished by a fine of not exceeding five thousand dollars or by imprisonment not exceeding five years, or by both such fine and imprisonment, according to the laws of the United States relating to such offense, and shall be liable in civil proceedings to be prosecuted in behalf of and in the name of the tribe for the amount or value of the money or property so withheld.

* * * * * * *

SEC. 15. The Secretary of the Interior shall take possession of all buildings now or heretofore used for governmental, school, and other tribal purposes, together with the furniture therein and the land appertaining thereto, and appraise and sell the same at such time and under such rules and regulations as he may prescribe, and deposit the proceeds, less expenses incident to the appraisement and sale, in the Treasury of the United States to the credit of the respective tribes:

Provided, That in the event said lands are embraced within the geographical limits of a State or Territory of the United States such State or Territory or any county or municipality therein shall be allowed one year from date of establishment of said State or Territory within which to purchase any such lands and improvements within their respective limits at not less than the appraised value. Conveyances of lands disposed of under this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances.

SEC. 16. That when allotments as provided by this and other acts of Congress have been made to all members and freedmen of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes. In the disposition of the unallotted lands of the Choctaw and Chickasaw nations each Choctaw and Chickasaw freedman shall be entitled to a preference right, under such rules and regulations as the Secretary of the Interior may prescribe, to purchase at the appraised value enough land to equal with that already allotted to him forty acres in area. If any such purchaser fails to make payment within the time prescribed by said rules and regulations, then such tract or parcel of land shall revert to the said Indian tribes and be sold as other surplus lands thereof. The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations, which is not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding six hundred and forty acres to any one person, for a fair and reasonable price, not less than the present appraised value. Conveyances of lands sold under the provisions of this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances: *Provided further*, That agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person.

SEC. 17. That when the unallotted lands and other property belonging to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of Indians have been sold and the

moneys arising from such sales or from any other source whatever have been paid into the United States Treasury to the credit of said tribes, respectively, and when all the just charges against the funds of the respective tribes have been deducted therefrom, any remaining funds shall be distributed per capita to the members then living and the heirs of deceased members whose names appear upon the finally approved rolls of the respective tribes, such distribution to be made under rules and regulations to be prescribed by the Secretary of the Interior.

SEC. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits: *Provided,* That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him.

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period,

be removed by the act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal or restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

SEC. 20. That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided,* That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

SEC. 21. That if any allottee of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes die intestate without widow, heir or heirs, or surviving spouse, seized of all or any portion of his allotment prior to the final distribution of the

tribal property, the land shall escheat to and vest in such tary of the Interior, the lands allotted to him shall revert to the tribe and be disposed of as herein provided for surplus lands; but if the death of such allottee be not known by the Secretary of the Interior before final distribution of the tribal property, and such fact shall be known by the Secre- State or Territory as may be formed to include said lands. That heirs of deceased Mississippi Choctaws who died before making proof of removal to and settlement in the Choctaw country and within the period prescribed by law for making such proof may within sixty days from the passage of this act appear before the Commissioner to the Five Civilized Tribes and make such proof as would be required if made by such deceased Mississippi Choctaws; and the decision of the Commissioner to the Five Civilized Tribes shall be final therein, and no appeal therefrom shall be allowed.

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

SEC. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner.

SEC. 24. That in the Choctaw, Chickasaw, and Seminole

nations public highways or roads two rods in width, being one rod on each side of the section line, may be established on all section lines; and all allottees, purchasers, and others shall take title to such land subject to this provision, and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, such damages accruing prior to the inauguration of a State government shall be determined under the direction of the Secretary of the Interior and be paid for from the funds of said tribes, respectively.

All expenses incident to the establishment of public highways or roads in the Creek, Cherokee, Choctaw, Chickasaw, and Seminole nations, including clerical hire, per diem, salary, and expenses of viewers, appraisers, and others, shall be paid under the direction of the Secretary of the Interior from the funds of the tribe or nation in which such public highways or roads are established. Any person, firm, or corporation obstructing any public highway or road, and who shall fail, neglect, or refuse for a period of ten days after notice to remove or cause to be removed any and all obstructions from such public highway or road, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding ten dollars per day for each and every day in excess of said ten days which said obstruction is permitted to remain: *Provided, however,* That notice of the establishment of public highways or roads need not be given to allottees or others, except in cases where such public highways or roads are obstructed, and every person obstructing any such public highway or road, as aforesaid, shall also be liable in a civil action for all damages sustained by any person who has in any manner whatever been damaged by reason of such obstruction.

SEC. 25. That any light or power company doing business within the limits of the Indian Territory, in compliance with the laws of the United States that are now or may be in force therein, be, and the same are hereby, invested and empowered with the right of locating, constructing, owning, operating, using, and maintaining canals, reservoirs, auxiliary steam works, and a dam or dams across any nonnavigable stream within the limits of said Indian Territory, for the purpose of obtaining a sufficient supply of water to manufacture and generate water, electric, or other power, light, and heat and to utilize and transmit and distribute

such power, light, and heat to other places for its own use or other individuals or corporations, and the right of locating, constructing, owning, operating, equipping, using, and maintaining the necessary pole lines and conduits for the purpose of transmitting and distributing such power, light, and heat to other places within the limits of said Indian Territory.

That the right to locate, construct, own, operate, use, and maintain such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through the Indian Territory, together with the right to acquire, by condemnation, purchase or agreement between the parties, such land as it may deem necessary for the locating, constructing, owning, operating, using, and maintaining of such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through any land held by any Indian tribe or nation, person, individual, corporation, or municipality in said Indian Territory, or in or through any lands in said Indian Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any company complying with the provisions of this act: *Provided,* That the purchase from and agreements with individual Indians, where the right of alienation has not theretofore been granted by law, shall be subject to approval by the Secretary of the Interior.

In case of the failure of any light or power company to make amicable settlement with any individual owner, occupant, allottee, tribe, nation, corporation, or municipality for any lands or improvements sought to be condemned or appropriated under this act all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, nation, corporation, or municipality by reason of the appropriation and condemnation of said lands and improvements shall be determined as provided in sections fifteen and seventeen of an act of Congress entitled "An act to grant a right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (public, numbered twenty-six), and all such proceedings hereunder shall conform to said sections, except that sections three and four of said act shall

have no application, and except that hereafter the plats required to be filed by said act shall be filed with the Secretary of the Interior and with the Commissioner to the Five Civilized Tribes, and where the words "Principal Chief or Governor" of any tribe or nation occur in said act, for the purpose of this act there is inserted the words Commissioner to the Five Civilized Tribes. Whenever any such dam or dams, canals, reservoirs, and auxiliary steam works, pole lines and conduits are to be constructed within the limits of any incorporated city or town in the Indian Territory, the municipal authorities of such city or town shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such cities and towns: *Provided,* That all rights granted hereunder shall be subject to the control of the future Territory or State within which the Indian Territory may be situated.

* * * * * * *

SEC. 27. That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: *Provided,* That nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other act of Congress.

SEC. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided,* That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further,* That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said

tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

SEC. 29. That all acts and parts of acts inconsistent with the provisions of this act be, and the same are hereby, repealed.

Approved, April 26, 1906.

Office Supreme Court, U. S.
FILED
DEC 6 1910
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 330.

DAVID MUSKRAT AND J. HENRY DICK, ON THEIR OWN BEHALF, ETC., APPELLANTS,

vs.

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REPLY BRIEF FOR APPELLANTS.

WM. H. ROBESON,
DANIEL B. HENDERSON,
JOHN J. HEMPHILL,
FRANK J. BOUDINOT,
Attorneys for Appellants.

IN THE

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REPLY BRIEF FOR APPELLANTS.

By leave of the court this brief is filed in reply to the several briefs filed by the United States.

It is stated by the defendants that these appellants received their allotments of lands *from the United States*. This idea may, to a greater or less degree, have influenced the judgment of learned counsel upon other points, and should therefore be corrected.

All the Title to the Cherokee Lands and All the Right to the Cherokee Funds in the Cherokee People—the United States Without Interest in Either.

By the treaty of 1828 (7 Stat., 311) the United States granted *to the Cherokee people, in fee simple,* the lands involved in this controversy. No part of this title had ever passed out of the Cherokees up to July 1, 1902, the date of the Cherokee agreement. Therefore, the appellants did not receive their allotments from the United States, but the act of allotment was a simple partition among themselves, made in pursuance of section 20 of the treaty of 1866 (14 Stat., 799).

Citizenship.

Defendants' brief declares that the Cherokee Indians were not made citizens of the United States by the act of March 3, 1901.

This denial is based upon the theory that as the act of March 3, 1901, was an amendment to the general allotment act of February 8, 1887 (24 Stat., 388), it was modified by certain conditions named in that act affecting other Indians for whom the act provided a method for acquiring citizenship. That act provided that citizenship might be acquired by *two* classes of Indians. The first of these was composed of Indians to whom allotments should be made and patents issued, and with the issuance of the patents such patentees became, *ipso facto,* citizens of the United States. The second class of Indians who might acquire citizenship, were those who, not having allotments, and therefore not receiving patents, should separate themselves from an Indian tribe and adopt the habits of civilized life. As to both classes it was required that they must have been born within the territorial limits of the United States.

The wording of the act is that each of such persons "is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges and immunities of such citizens."

The act of March 3, 1901, added after the words "civilized life" in section 6 the words "every Indian in the Indian Territory," and these words immediately preceded the language, "is hereby declared to be a citizen of the United States." So that the act of March 3, 1901, so far from requiring the Indians in the Indian Territory who were to become citizens to have received allotments and patents, or to have separated themselves from a tribe, and adopted the habits of civilized life, omitted even the condition of the original act that the Indian must have been born within the territorial limits of the United States. In other words, not a single condition was attached to the Indian in the Indian Territory, except merely that of residence in the Indian Territory.

The defendants have overlooked the fact that the act of February 8, 1887, is an allotment act, and section 8 thereof excludes, not the Indians, *but the territory* of the Cherokees and other tribes mentioned therein, from partition. The act of March 3, 1901, amending this allotment act, has reference solely to citizenship, which it bestows upon all Indians in the Indian Territory.

The sixth section of the allotment act of February 8, 1887, was further amended by the act of May 8, 1906, and the eighth section of the original act was allowed to remain unrepealed, for the reason that the whole scheme of the allotment act of February 8, 1887, related to the future allotment to Indians other than those living in the excepted territory as they should, from time to time, take allotments or adopt the habits of civilized life. That provision has no relation whatever to the act of March 3, 1901, which, in unmistakable terms, had already conferred citizenship upon the Cherokee Indians; and it is wholly immaterial whether that amendment was retained in the general allotment act as last

amended, for the reason that citizenship once granted to appellants could never be taken from them.

Heff *vs.* U. S., 197 U. S., 488.

The Effect of Conferring Citizenship.

The defendants in their brief insist that such citizenship as was conferred upon the Cherokees by the act of March 3, 1901, was a limited or qualified one. We observe that the act of February 8, 1887, adds to the declaration that the Indians within its contemplation shall be citizens of the United States that they shall be "entitled to all the rights, privileges, and immunities of such citizens." Thus given *all* the rights and *all* the privileges and *all* the immunities, how may it possibly be said that the citizenship conferred upon them was limited or qualified?

The brief for the defendants then asserts that the conferring of citizenship did not invest the Indians with any rights invoked in this litigation that they did not otherwise have. We are not insisting that the Indian was not a "person" within the meaning of the Fifth Amendment to the Constitution, who might not be deprived of his property without due process of law, but we are insisting that, as was declared by Mr. Justice Brewer in the Heff case, the Indian had been emancipated from Federal control, and that the United States could not reassume its guardianship over him under the guise of which it had assumed for so many years to govern and supervise both the Indian and the Indian's property.

This same general allotment act of February 8, 1887, declares that any of the persons becoming citizens under its provisions do so without in any manner impairing or otherwise affecting their right to tribal or other property. The whole contention against the appellants in this case is that the United States possesses, by reason of its immemorial treatment of the Indians, the power to pass different laws for

their government and the control of their property than those which apply to white citizens of the United States.

All Cherokee Indians in the Indian Territory, being citizens on July 1, 1902, and each of them having an individual right in the communal lands and funds belonging to the former nation of which he had been a member when the act of July 1, 1902, was passed, that act was submitted to them as the owners of the communal lands, as a scheme for the partition of those lands, so that each individual Indian might receive his share thereof. Congress did not assume to declare how the lands should be divided, but merely offered a plan which was not to be effective until these citizens of the United States acceded to it, which they did by a popular vote.

The Act Appointing the Dawes Commission.

The act of July 1, 1902, was merely a step in the direction clearly indicated as the general policy of the Government in providing for the appointment of what is known as the Dawes Commission, the purpose of which was declared to be "*the extinguishment of the national or tribal title;*" and this extinguishment was to be "either by cession of the same or some part thereof to the United States, *or by the allotment and division of the same in severalty among the Indians.*"

The act of July 1, 1902, not providing for a cession to the United States, accomplished the extinguishment of the tribal title, therefore, by allotment and division in severalty among the Indians, and it limited the individuals to those living on September 1, 1902.

We desire to impress upon the court that the act of July 1, 1902, was not simply an act of Congress; that it was by its terms to be an agreement among the owners of these communal lands, because it submitted to them the plan of dis-

tribution, the time of distribution and the persons or classes of persons to whom the distribution should be made, and provided that it should not be effective unless these individual citizens, who were the owners of the property, assented to it, as we have stated.

By sections 25, 26, and 31 it was declared that all persons who should become enrolled for allotment, living on September 1, 1902, and applying for enrollment prior to October 31, 1901, *and none other* should share in either the lands or the funds of the tribe or the proceeds of certain lands reserved from allotment. We do not wish to be understood as saying that the act in so many words declared that the community should terminate on September 1, 1902, but because it fixed that date as one on which a Cherokee must be living in order to share in the lands and funds of the former tribe, and because it provided that the lands of those who should receive allotments under the act, together with the proportionate share of such allottees in the other tribal property, *should descend to their heirs,* instead of reverting to the community, and because this was assented to by the common owners, it necessarily terminated the communal title as of that date, and invested those Cherokee citizens of the United States living on September 1, 1902, with an individual right to every particle of the lands and funds and other property of the Cherokee Nation. For, prior to that date, if one died, his share reverted to the community of which he was a member, and there was no such thing as an estate of inheritance. Some day had to be fixed on which an interest in communal property should be transformed into an estate of inheritance. Manifestly some children born in the future would never share in the communal property and funds of the nation as communal owners, but to all those who were thereafter to be born, there was given what no Cherokee citizen ever had before, the right of inheritance.

Continuance of Tribal Government.

Much stress is laid by the defendants upon a resolution and act of Congress declaring that the tribal government should be extended "for all purposes under existing law" or "for all purposes authorized by law," and it is sought to have the court hold that with this slender thread Congress yet retained its old control and supervision of these Indian citizens, so that it might still be under *honorable* obligations, and yet not under *legal* obligations, not to attach other conditions than those named in the grant. We have urged, and we insist with much earnestness, that there was no real tribal government; that for purposes of convenience, for instance, as to the management of the schools among the Cherokees and the maintenance of their public buildings and of other institutions, some one familiar with the conditions should be retained or appointed. What was more appropriate than that, though placed in subjection to the Secretary of the Interior in every single particular, the former principal chief of the tribe should be named as such agent, and his appointment assented to by the Cherokees? That he was completely under the authority of the Secretary of the Interior is demonstrated in the provision giving power to the Secretary to remove him and appoint another.

It was said by Chief Justice Nott, of the Court of Claims, in the case of the Cherokee Nation *vs.* The United States (40 Ct. Clms., 330):

> "In this condition of affairs the court must regard the Cherokee nation as in a condition somewhat analogous to that of a trustee or receiver that has become insolvent."

It was suggested from the bench, in the oral argument of this cause, that the former Cherokee Nation was to be treated as a defunct corporation, having assets upon which it was necessary yet to administer. And the latter suggestion prop-

erly describes what the defendants choose to call "the tribal government of the Cherokee Nation."

In this connection it may be pertinently inquired how there could be a tribe made up of citizens of the United States? When every Cherokee Indian in the Indian Territory was made a citizen of the United States, and thereby removed from under the guardianship of Congress, there could be no aggregation of such persons over whom Congress could have plenary control, such as it had exercised over Indian tribes. It is impossible to conceive of a tribe of Indians subject as a body to the plenary control of Congress, when every individual member of that body was as free in the exercise of all the rights of citizenship as any citizen of the United States. And it is evident from this that it was never the purpose of Congress to continue a tribal existence which would either invest any former representatives of the defunct tribe with the power to legislate as to the rights of its members, or to invest Congress with that supervisory control either to protect or oppress them, which the defendants so frequently invoke. Moreover, if this alleged continuation of the tribal existence could have so revived the former community as either to give it power, through unauthorized representatives, to surrender the rights of citizens of the United States which had been previously established by a popular vote, or to give Congress the power of plenary control over the aggregation in such a way as to deprive the citizens of their property, it, too, accomplished the taking of the property of these citizens without due process of law, and was therefore in violation of the fifth amendment.

The first proposition of defendants in their supplemental brief at page 35, we deny.

No case is produced to show that Congress can treat full-blood Indians with the absolute injustice claimed by defendants.

If the proposition is true at all in any sense, it is certainly not true with reference to those persons who are sim-

ply Indians by blood and are not Indians in law, and no case can be produced showing that Congress can, by acts subsequent to the grant, control or affect a title that has vested in an Indian.

In Jones *vs.* Meehan (175 U. S., 1, p. 32), the court states its conclusion to the effect that after the grant to a tribal Indian not a citizen of the United States vesting title in him, neither Congress nor the executive department could add any restrictions of any nature whatsoever upon this title and further—

> "The construction of treaties is the peculiar province of the judiciary, and except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, *or to affect titles already granted under the treaty itself.*"

It, therefore, held that the resolution of Congress passed subsequent to the granting of title and the proceedings of the Interior Department were of no effect upon the previously acquired rights of the plaintiff.

This, of course, is not a case "purely political," because the tribe had been absolutely abolished and the acts of 1904 and 1906, of which we complain, do not purport to be directed at the tribe, but only at certain members of the tribe designated according to the quantum of Indian blood.

The defendants assert that the rights of third parties had intervened in the case of Jones *vs.* Meehan, which is true, but the decision of the court is based upon principles wholly distinct from the theory that the rights of third parties had intervened. The decision is based solely upon the ground that when the title vests in an Indian who is not even a citizen of the United States, and yet, in full tribal relations, he acquires such right as the government in none of its departments can in any way divest him of.

The defendants assert that for forty-four years it was unlawful for any individual Indian to sell his lands and they

quote several acts of Congress. They do not quote, however, any decision sustaining the legality of such act of Congress, and we assert that there is no case which denies to an individual Indian in whom property has vested in fee simple, the right and power to use and enjoy it in the same manner as other persons. Since 1834 Congress has not even pretended to possess the right to divest an individual Indian of property vested in him either by treaty or patent.

No such right was "expressly assumed" in Jones *vs.* Meehan, nor is there any reason whatever for asserting, as the defendants do, that Congress had either by contemporaneous or subsequent act, the power to restrict the right of the Indian grantee to dispose of his land.

By the act of June 30, 1834, Congress omitted all reference to the individual Indian in its enactment relating to the purchase or sale of Indian lands, thereby confining the control of Congress solely to the tribal lands owned and controlled by a tribe of Indians.

The defendants quote Smith *vs.* Stevens (10 Wall., 321) in support of their contention. The facts in that case are as different from the case at bar as is possible to be. It differs from our case in the following particulars:

1. They were tribal Indians.

2. They were not citizens of the United States.

3. The allotments were "reserved out of the quantity ceded by the nation to the United States,' so that the allottees took by the treaty only the Indian title of occupancy.

4. The treaty actually prohibited alienation.

5. The act of May 26, 1860, transferred the title of the United States to the allottees and at the same time provided the only scheme by which these allotments might be alienated through the Secretary of the Interior.

6. Smith's deed did not in any way comply with the terms of the act under which alone a title could pass.

The defendants cite from the case of the Kansas Indians. We quote the following from the opinion in the same case, which shows conclusively that they are tribal Indians:

> "If they have outlived many things, they have not outlived the protection afforded by the constitution, treaties, and laws of Congress. It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, '*but until they are clothed with the rights and bound to all the duties of citizens' they enjoy the privilege of total immunity from State taxation.*"

The defendants state that the Secretary of the Interior on January 15, 1902, fixed the date for closing the Cherokee roll as of July 1, 1902, under the authority of an act of Congress of March 3, 1901 (31 Stat., 1077), and that the act of July 1, 1902, the Cherokee agreement, changed the date so fixed and moved it up to September 1, 1902. They then conclude that if Congress had the right to change the date once so fixed and move it up to September 1, 1902, it must also have had the right, by the acts of April 26 and June 21 1906, to move it up to March 4, 1906.

In reply to which we respectfully submit the following facts, evidenced by public records:

At the time of the passage of the act, authorizing the Secretary of the Interior to fix the date for closing the rolls, in the event a date could not be agreed upon with the Cherokees, there was pending a proposed agreement which had been submitted by Congress to the Cherokees for the allotment of their lands, and one of the provisions of which was that the roll should be made as of April 1, 1900 (31 Stat., 848). This proposition was adopted by Congress March 1, 1901, but was rejected by the Cherokees on April 26, 1901, by a majority of 1,023 out of a total vote of 5,569 cast at the election held for the purpose. (See letter from Secretary of Interior in H. R. Doc. 552, 57th Congress, 1st session).

Further, on December 19, 1901, and before the Secretary had attempted, under the above authority, to fix any date for closing the roll, the Cherokees, in turn, submitted to Congress an allotment scheme of their own providing for the division of their common estate in accordance with the 20th article of the treaty of 1866. (See H. R. Doc. 552, 57th Congress, 1st session, pages 2 to 10.)

We beg to call special attention to sections 33 and 34 of this proposition of the Cherokees, which provided:

> "The rolls of membership upon which final allotment of all the common property of the Cherokee Nation shall be made shall be as of the date of the final ratification of this plan of allotment and the names of all persons then living and entitled to receive allotment shall be placed on said rolls.
>
> *"No child born to any member after said date shall be entitled to a per capita share of said common property."*

Now, while this proposed agreement was pending before Congress, the Secretary undertook, on January 15, 1902, in accordance with the above authority, to fix the date as of July 1, 1902, for closing the rolls

The defendants assert that it must be presumed that the prerequisite as to the fixing of the date by the Secretary had been complied with in the absence of proof to the contrary, and we respectfully submit that this presumption is overcome by the mere reading of the above-mentioned public documents.

But, before this date, which the Secretary attempted to fix, became effective, and in disregard of his action, in attempting to fix the date without the consent of the Cherokees, the United States accepted the proposition of the Cherokees by the act of Congress of July 1, 1902, and which became the Cherokee agreement, and by which the first and only authoritative date, that of September 1, 1902, was fixed, as of

which the Cherokee common property should be divided and become individual estates of inheritance.

Thus the inference to be drawn from the statement, that Congress had the right to change the date from September 1, 1902, and move it up to March 4, 1906, is entirely unjustifiable.

This date of September 1, 1902, provided for in the Cherokee agreement, as of which the roll should be made, has not been changed nor attempted to be changed. The roll was made as of that date, and upon that date 37,561 individual estates became vested in the 37,561 persons whose names appear on the Cherokee roll as of that date, and which cover all the property theretofore owned by the Cherokee people or nation, and these particular persons numbering 37,561, or the heirs of those who have since died, have continued from that date to the present time to own all of that property.

What Congress has attempted to do, by the act of June 21, 1906, is to enroll 5,610 additional persons and transfer to them practically one-sixth of the entire estate of each of those who became vested with the entire property and took allotments under the original agreement, and this transfer is to be made by act of Congress, without the knowledge or consent of the owners of the property, to persons not even in existence when the title was originally vested.

Moot Question.

Speaking generally from the decisions of this court on the subject, a moot case is one in which no substantial injury is alleged and no substantial relief can follow—one wherein a judgment would not be a finality, but a mere expression of opinion, to which effect could not be given, or one wherein some event has intervened which would render impossible a compliance with the court's judgment.

This jurisdictional act was passed because Brown and Gritts in the one case and Muskrat and Dick in the other had a cause of action against certain administrative officers of the Government, and had brought suits in the Supreme Court of the District of Columbia to enjoin the Secretary of the Interior from proceeding under the acts complained of, on the ground that those acts were violative of the constitutional rights of the respective petitioners. As is shown in one of the briefs, this was given in the debate in the Senate as the reason for the establishment of the jurisdiction now invoked, and the establishment of this jurisdiction avoided the multiplicity of suits which must have ensued if all the 37,561 allottees had sought, in individual actions, to protect and enforce their rights under the act of July 1, 1902.

Now as to the effect of the court's decision: We have insisted that the United States has supplied this method of determining the rights of these appellants instead of the method they adopted when they instituted their suits in the Supreme Court of the District of Columbia.

The officer against whom the suit was brought in the District of Columbia was the Secretary of the Interior, in his official and not in his personal capacity. He was sued as an agent or representative of the United States. So by the act of March 1, 1907, the United States elects to "stand in judgment" in the place of the Secretary of the Interior, and the act provides, in order that that may be done, that the United States alone shall be made the defendants.

As to the effect of this we cite Minnesota *vs.* Hitchcock, 185 U. S., 373-387. The court there says:

> "But it may be said that the United States has no substantial interest in the lands; that it holds the legal title under a contract with the Indians and in trust for their benefit. This is undoubtedly true, and if the case stood alone upon the construction of the treaty between the United States and the Indians, there might be substantial force in this suggestion.

> But Congress has, for the Government, assumed a personal responsibility.
>
> "It has by this legislation in effect declared that the Indians, although the real parties in interest, need not be made parties to the suit; that the United States will, for the purpose of the litigation, stand as the real party in interest."

The court then declares that the dispute is one affecting the title to real estate.

So here, whatever is attempted to be done of which we complain, is attempted to be done by the Congress of the United States. Whatever injury these appellants might suffer if the acts be held effective is occasioned by the United States.

In the case of Stevens *vs.* The Cherokee Nation (174 U. S., p. 457) the court declared that the only question submitted was the constitutionality of the act, and the court held it to be constitutional.

In the Cherokee Intermarriage cases (203 U. S., p. 76) the court, without naming an individual defendant, adjudged that intermarried white citizens of a certain class were entitled to share in the properties of the nation, while intermarried white citizens of another class were not so entitled.

Defendants contend that this is a moot case because the act of May 27, 1908, re-enacts, in part, the obnoxious provisos of the act of April 26, 1906.

If the act of 1906 be unconstitutional, will defendants contend that it could have been superseded by a subsequent act of the same tenor—also unconstitutional?

By Finding XVI of the Court of Claims, in Case No. 331 (Rec., 28), more than 25,000 land transfers are said to have taken place in contravention of the act of April 26, 1906. If the act of 1908 supersedes that of 1906, there still remain, therefore, these 25,000 transactions, the legality of which must depend upon the act of 1906, and so long as they remain this case cannot present a moot question.

During the oral argument it was stated by the attorney claiming to represent the Cherokee Nation that within forty-eight hours after a declaration by this court that these acts of Congress complained of are invalid, no full-blood Cherokee in Oklahoma would own enough land in which to be buried, and similar statements were made by him regarding their alleged incompetency and degeneracy, which counsel for appellants, representing these full-bloods under the authority of an act of Congress, challenge and deny. Not one of the statements made by the attorney is supported by the record. On the contrary, the record shows that it will be impossible for any full-blood Cherokee to alienate his homestead until twenty-one years from the date of the receipt of his certificate of allotment. So the fearful state of poverty predicated cannot be reached sooner than 1923.

Counsel submit that no such issue as this ought to have found its way into the case; but if the question be one of any interest whatever, we refer to the report of the Senate Committee on the subject, appearing on pages 58 and 59 of our original brief, wherein they report the legislation complained of to be "unwise, *injurious* to the Indian, and of no validity."

It might not be inappropriate in this connection to refer to the fact that this is not the first time the representatives of the so-called Cherokee Nation has appeared in this court to oppose, as in the case at bar, the contentions of the Cherokees by blood as to the disposition of their property, as will appear from the record in the Eastern Cherokee case in which the contentions of the Cherokees by blood were sustained over those of the representatives of the so-called Cherokee Nation.

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Office Supreme Court, U. S.
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IN THE

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OCTOBER TERM, 1910.

No. 330.

DAVID MUSKRAT AND J. HENRY DICK ET AL.

vs.

THE UNITED STATES.

STIPULATION.

In accordance with a stipulation made between the attorneys of record in the Court of Claims, it is hereby stipulated in this cause, as follows:

> "The petitioners are enrolled as members of the Cherokee tribe, residents of that part of the State of Oklahoma, formerly Indian Territory, and are the identical persons named in the act of Congress of March 1, 1907 (34 Stat. L., 1028), conferring jurisdiction upon this court to hear and determine this

suit. They have received allotments of both homestead and surplus lands under the provisions of the allotment act of July 1, 1902 (32 Stat. L., 716).

WILLIAM H. ROBESON,
For Appellants.
WADE H. ELLIS,
For the United States.

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APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE CHEROKEE NATION.

Statement of the Case.

This case was instituted under the following provision contained in the Indian appropriation act (34 Stat., 1015-1028) approved March 1, 1907:

> That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July first, nineteen hundred and two, an act entitled "An act to provide for the allot-

ment of lands to the Cherokee Nation, for the disposition of townsites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts in Congress passed since the said act of July first, nineteen hundred and two, so far as the said acts, or any of them, attempt to increase or extend the restrictions upon alienations, incumbrance, or the right to lease the allotment of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, as provided for in the said act of July first, nineteen hundred and two.

And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal by either party to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to same by said courts and by the Attorney General, who is hereby charged with the defense of said suits.

Upon the rendition of final judgment by the Court of Claims or the Supreme Court of the United States denying the validity of any portion of said acts authorized to be brought into question in either or both of said cases the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof for

> services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two.

and is for the purpose of testing the constitutionality of section 2 of the act of Congress approved April 26, 1906 (34 Stat., 137), as amended by the act of June 21, 1906 (34 Stat., 325), authorizing the enrollment of minor children born to recognized and enrolled citizens of the Cherokee Nation, and granting to them an equal share in the allotment of Cherokee lands and in the distribution of Cherokee tribal moneys.

Section 2 of said act of April 26, 1906, is as follows:

> SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and re-enacted, and after the expiration of nine months from the date of the original selection

> of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this act as to allotments heretofore made, no contests shall be instituted against such allotment: *Provided,* That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further,* That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided,* That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States.

The amendatory provision of the act of June 21, 1906, referred to is as follows:

> That section two of the act entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, be, and the same is hereby, amended by striking out thereof the words *"Provided further,* That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States."

The act of July 1, 1902, provided that the Cherokee roll should be made up of those living on September 1, 1902, and

that no persons born thereafter should participate in the allotment of Cherokee tribal lands or the distribution of Cherokee tribal funds. The act of April 26, 1906, as amended by the act of June 21, 1906, admitted children born of enrolled Cherokee parents between September 1, 1902, and March 4, 1906, to participate in the allotment and distribution of tribal lands and funds.

On May 11, 1900, the Commission to the Five Civilized Tribes began the making of a roll of the citizens of the Cherokee Nation under the allotment act of June 28, 1898 (30 Stat., 495), and was still engaged in the making of this roll when the citizenship act of March 3, 1901 (31 Stat., 1073), the allotment act of July 1, 1902, *supra,* and the amendatory acts of April 26, 1906, *supra,* and June 21, 1906, *supra,* were passed. Under the act of March 3, 1901, *supra,* the Secretary of the Interior fixed the closing of the roll as of July 1, 1902. The date of the closing of the roll was afterwards extended by the act of July 1, 1902, *supra,* to September 1, 1902, and by the act of April 26, 1906, *supra,* was further extended to March 4, 1906, at which time it was finally completed (Rec., p. 20).

On September 28, 1905, the Cherokee National Council, in pursuance of the provisions of the Cherokee constitution, passed an act approved November 7, 1905, by the President of the United States, which provided, among other things, for the appointment by the Principal Chief of a commission consisting of three persons to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs (excepting all matters pending in the United States courts), of which the Principal Chief was made *ex-officio* a member. The commission was appointed in accordance with the above act (Rec., p. 23).

On September 29, 1905, the commission was instructed by a joint resolution of the National Council of the Cherokee Nation that it was the sense of the Cherokee people that

> "all children born since September first, nineteen hundred and two, and prior to March fourth, nine-

> teen hundred and six, who but for the limitation contained in section twenty-five of the act of Congress of July first, nineteen hundred and two, would be entitled to share equally with children born prior thereto, and that said participation should, if possible, be equal in every respect in the lands and moneys as provided by said act of Congress. If this cannot be done, then a sum of money should be given to each of said children as will equal so far as possible the share which has been given others under said act" (Rec., p. 24).

In consequence of the efforts of the Cherokee commission appointed and instructed as aforesaid, the provision for the enrollment of minor children living on March 4, 1906, born of enrolled Cherokee citizens, was incorporated in the act of April 26, 1906, *supra,* and amended by the act of June 21, 1906, *supra,* so as to remove any doubt that it applied to the Cherokee Nation (Rec., p. 24).

After the allotment to all of those entitled under the provisions of the act of July 1, 1902, *supra,* there remains sufficient lands and funds to provide for the allotment of all of the minor Cherokee children entitled to enrollment under the act of April 26, 1906, *supra,* as amended by the act of June 21, 1906, *supra* (Rec., pp. 21 and 22).

Section 63 of the act of July 1, 1902, *supra,* provided that:

> "The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred six."

But by a joint resolution of Congress approved March 2, 1906 (32 Stat., p. 822), it was further extended as follows:

> The tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby *continued in full force and ef-*

> *fect for all purposes* under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law.

And section 28 of the act of April 26, 1906, *supra,* contained the following provision further continuing the Cherokee tribal government:

> "That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year."

And no other act has subsequently been passed discontinuing the Cherokee tribal government.

It is conceded that there are enough unallotted tribal lands and undistributed tribal funds to provide allotments for enrolled members of the Cherokee Nation, including those enrolled under section 2 of the act of April 26, 1906, *supra,* as amended by the act of June 21, 1906, *supra.*

The allotments made to individual citizens prior to the passage of the act of April 26, 1906, *supra,* will not in any way be disturbed or affected (Finding XV, Rec., p. 25).

The Court of Claims in its opinion found as conclusions of law as follows:

> 1. The petitioners and all other members of the Cherokee Nation of Indians were citizens of the United States on July 1, 1902, the date of the passage of the act of that date, as were their children thereafter born as set forth in Finding V.
>
> 2. The Cherokee Nation is and always has been recognized by the United States as a distinct political

community, subject only to the paramount authority of the United States.

3. The tribal existence and present tribal government of said Cherokee Nation were existing at the date of the passage of the acts April 26 and June 21, 1906, as set forth in Finding XV.

4. No citizen of the Cherokee Nation has any vested interest in the unallotted lands of said nation or in the undistributed funds in the Treasury of the United States to the credit of said nation or tribe.

5. Section 2 of the act April 26, as amended by the act June 21, 1906, was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation, as instructed by the national council of the Cherokee Nation, with the approval of the President of the United States, as set forth in Findings XI, XII, and XIII.

6. The Congress have plenary power to guard, protect, and administer upon the tribal property of the Cherokee Nation, and that power is political, and is for the legislative branch and not for the courts to determine.

7. The provisions of the act April 26, as amended by said act of June 21, 1906, authorizing the enrollment of minor children born after September 1, 1902, and living on March 4, 1906, is a valid constitutional statute, and the minor children so enrolled, as therein provided and set forth in the findings herein, are entitled to remain upon the final Cherokee roll for the purpose of participating in the allotment of the Cherokee lands and in the distribution of the Cherokee tribal funds in the same manner and to the same extent as Cherokee citizens enrolled under the acts June 28, 1898 (30 Stat. L., 495), May 31, 1900 (31 *ibid.*, 221), and July 1, 1902 (32 *ibid.*, 716).

8. The petition is therefore dismissed and judgment ordered for the defendants (Rec., pp. 25-26).

BRIEF AND ARGUMENT.

Status of the Cherokee Nation.

The second conclusion of law in the opinion of the court hereinabove quoted defines the status of the Cherokee Nation.

The Cherokee Nation has been recognized as a body politic, a domestic dependent nation, subject only to the paramount authority of the Government of the United States, for more than a century, and its status has been the subject of so many judicial decisions by the courts, including decisions of the Court of Claims and of this court, wherein its history as a nation has been repeatedly so exhaustively reviewed and its relation to the Government of the United States so clearly defined, that reference to them is all that is deemed necessary.

A treaty was made with the Cherokees by the United States as early as 1785 (7 Stat., 18), and from time to time thereafter numerous treaties were entered into with the Cherokees recognizing them as a nation, the last being dated July 19, 1866 (14 Stat., 799). Congress by an act approved March 3, 1871, section 2079, Revised Statutes, determined to change the policy of the United States in dealing with Indian nations or tribes, and instead of negotiating treaties with them to govern them directly by acts of Congress. Under the treaty of 1835 (7 Stat., 478) and treaties made prior thereto the Cherokees removed west of the Mississippi River, became reunited by an act of union of date July 12, 1838, received a patent to their lands, of which the present lands are a part, from the President of the United States, dated December 31, 1838, and adopted a written constitution September 6, 1839. In accordance with this constitution the Cherokee government was recognized, consisting of three departments, the legislative, the executive, and the

judicial, and a code of written laws was adopted, which laws were enlarged upon, amended, or repealed, in whole or in part, from time to time. (Cherokee Trust Funds, 117 U. S., 288; *Cherokee Nation vs. Southern Kansas Railway Co.*, 135 U. S., 641; *Cherokee Nation vs. Journeycake*, 155 U. S., 196; *Delaware Indians vs. Cherokee Nation*, 193 U. S., 127; Compiled Laws of the Cherokee Nation, 1892; Intermarried White cases, 40 C. Cls., 411.)

These decisions abundantly sustain conclusion two of the Court of Claims.

Cherokee tribal government still in existence and recognized as such.

The Cherokee Nation is still recognized as a political community by the political department of the United States.

The courts have uniformly held that as long as a nation of Indians was recognized in the tribal capacity by the political department of the United States they were under the supervisory control of Congress. (The Kansas Indians, 5 Wall., 756, 757; *Jones vs. Meehan*, 175 U. S., 1, and cases cited.)

Section 63 of the act of July 1, 1902, looked to a complete administration upon the entire Cherokee estate prior to March 4, 1906, and provided "the tribal government of the Cherokee Nation shall not continue longer than March 4, 1906," but at that time it was found that the enrollment work had not been completed and a large part of the Cherokee lands were still unalloted, and Congress by joint resolution approved March 2, 1906 (34 Stat., 822), continued the tribal government in the following language:

> "The tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby *continued in full force and effect for all purposes* under existing laws until all

> property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law."

Section 28 of the act of April 26, 1906 (34 Stat., 137), continued the tribal government of the Cherokee Nation "until otherwise provided by law," and no act of Congress has subsequently been passed discontinuing the Cherokee tribal government.

The record in this case shows that the act of the Cherokee council under which the Cherokee commission was appointed was approved by the Principal Chief and by the President of the United States November 7, 1905 (Rec., p. 23), and also the joint resolution instructing said commission on August 17, 1907 (Rec., p. 24), *and the approval of said acts by the President was a recognition of the Cherokee Nation by the political department of the United States.*

As late as January 27, 1908, the debates of the Senate of the United States show that the Senate refused to insert the word "late" as an amendment before the words "Five Civilized Tribes" in the Indian appropriation bill then pending which is an expression of the sense of the Senate that the tribes were not regarded as dissolved.

But the Court of Claims also recognized the Cherokee Nation as a political community when on October 7, 1904, it permitted it to intervene in the Intermarried White cases (40 C. Cls., 411), and this court recognized it when it rendered its decision on appeal November 5, 1906 (203 U. S., 76). See Delaware Case 193 US 127

The Court of Claims, after quoting section 63 of the act of July 1, 1902, *supra,* the joint resolution of Congress approved March 2, 1906, *supra,* and from section 28 of the act of April 26, 1906, continuing the tribal existence and present tribal government of the Cherokee Nation, said:

> "Therefore, in considering the questions involved, we shall assume the validity of those provisions con-

> tinuing the tribal existence and tribal government of the Cherokee Nation in force and effect until all property of said nation shall have been distributed among the individual members thereof."

In the case of Brown and Gritts vs. The United States, commenting upon the continuance of the Cherokee tribal government, the Court of Claims on February 8, 1909 (44 C. Cls., 283), used the following language:

> "As the United States is the self-constituted guardian of the Indians with plenary authority over their tribal relations, it is for Congress and Congress alone to determine when that relation shall cease."

In other words, when Congress, by their legislation, have declared that the tribal government of the Cherokees shall "continue in full force and effect for all purposes authorized by law until otherwise provided by law," the courts cannot enter into the quantum of authority remaining in the tribe, and by construction defeat the will and purpose of Congress.

And the court in the same opinion also said:

> "Nor will we analyze the acts to ascertain of how much authority the tribal government has been shorn."

In the case of Kansas Indians, *supra*, upon the question of the diminished power of the tribal government this court held:

> "Because some of those customs have been abandoned, owing to the proximity of their white neighbors may be a witness of the superior influence of our race, but does not tend to prove that their tribal organization is not preserved."

And further on in the same opinion this court said:

> "But the action of the political department of the Government settles beyond controversy, that the Shawnees are as yet a distinct people, with a perfect tribal organization. Within a very recent period their head man negotiated a treaty with the United States, which, for some reason not explained in the record, was either not sent to the Senate, or, if sent, not ratified, and they are under the charge of an agent who constantly resides with them. While the General Government has a superintending care over their interests and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this *status* when she accepted the act admitting her into the Union."

We call the attention of the court to several provisions of the acts of July 1, 1902, *supra*, and April 26, 1906, *supra*, as showing the attitude of Congress towards the continuation of the tribal relations. We do this in view of the persistent, and to us unreasonable, contention of the appellants that the Cherokee tribal existence and government are limited to the allotment of public lands and a distribution of public funds. For instance, section 29 of the act of July 1, 1902, *supra*, under which all allotments have been and are still being made, provides that

> "the roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, *one with the Principal Chief of the Cherokee Nation,* and one to remain with the Commission to the Five Civilized Tribes."

Section 32 provides for the continuation of the Cherokee tribal schools, "under the supervision of a supervisor ap-

pointed by the Secretary and a school board *elected by the National Council.*"

Section 33 provides that all teachers shall be examined by said supervisor and school board, and section 34 provides that "*all moneys for carrying on the schools shall be appropriated by the Cherokee National Council.*"

Section 37 provides that damages for public highways or roads, other than on section lines, shall be paid out of the tribal funds, "*while the tribal government continues, and to be paid by the Cherokee Nation during that time.*"

Section 58 provides the manner in which patents to allotments shall be executed; that all of the right, title, and "interest of the Cherokee Nation, and of all other citizens in and to the lands embraced in his allotment certificate" shall be conveyed by the Principal Chief of the Cherokee Nation to the allottees.

Section 67 of the act provides for the payment of the indebtedness of the tribe existing at the date of the ratification of the act, and how the warrants shall be drawn therefor "*hereafter and prior to the dissolution of the tribal government.*"

Section 68 provides for the institution of suits in the Court of Claims *for the collection of claims of the Cherokee Nation, and for the appointment of attorneys by the tribe, acting through its Principal Chief.*

Section 6 of the act of April 26, 1906, *supra*, provides—

> "That if the Principal Chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the President of the United States, or if any such executive become permanently disabled, *the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability, or death*

of the incumbent, by appointment of a citizen by blood of the tribe."

Section 11 provides for the collection of the tribal revenues before and after the dissolution of the tribal government, and the settlement of the accounts of all tribal officers after the dissolution of the government.

See also, as to the duties and responsibilities of the existing Cherokee government, sections 18, 27, and 28 of the act of April 26, 1906.

The Cherokee Nation, by its recognized and duly appointed attorney, was allowed to file an intervening petition in this case and participate in the argument (Rec., pp. 12 to 18, inclusive).

The Cherokee government was certainly as much of a government and had as much power on April 26, 1906, the date of the second extension by Congress for closing the Cherokee roll, as it had on July 1, 1902, the date of the first extension of the closing of said roll, to September 1, 1902, and was as much of a government with as much power as it had on January 15, 1902, the date when the Secretary of the Interior issued the first order under the act of March 3, 1901, closing the roll on July 1, 1902. They were citizens of the United States upon all of said dates.

The reports of the Commission to the Five Civilized Tribes, and the evidence and stipulations in this case all show that there are yet lands unallotted and tribal funds undistributed. Patents must be issued for those lands signed by the Principal Chief as provided in section 68 of the act of July 1, 1902, *supra*. It results that there can be nothing in the contention of petitioners that the tribal government was abolished when the act of July 1, 1902, was ratified and promulgated on August 12, 1902.

It is urged that the Cherokees are citizens of the State of Oklahoma as well as of the United States. The case of *United States vs. Rickert* (188 U. S., 432), from which we

have quoted, disposes of that contention, but attention is invited to the historical fact that the State of Oklahoma was not admitted into the Union until November 16, 1907, whereas the provision of the act providing for the enrollment of minor children which this suit seeks to have declared unconstitutional was approved April 26, 1906, and the act of reference under which this action was brought was approved March 1, 1907, and this suit was instituted on the 16th day of March, 1907.

The enabling act admitting Oklahoma to statehood in section 3 provided:

> That nothing contained in the said constitution shall be considered to limit or impair the rights of person or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished), *or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise,* which it would have been competent to make if this act had never been passed.

which clearly shows that Congress had not up to that time, nor was it the purpose of Congress by that act, to emancipate the Five Civilized Tribes from the control of Congress.

Every provision of the several acts which counsel for appellants say dissolved the Cherokee tribal government was passed prior to July 1, 1902, except section 28 of the act of April 26, 1902, *supra*, making applicable to the other Five Civilized Tribes the act of March 3, 1901 (31 Stat., pp. 1058, 1077), requiring the approval of the President to the acts of the tribal councils.

It would seem, therefore, that the third conclusion of law found by the Court of Claims:

> "The tribal existence and present tribal government of the said Cherokee Nation were existing at

> the date of the passage of the acts of April 26 and June 21, 1906,"

as set forth in Finding XV, page 25, is abundantly sustained.

No individual citizen of the Cherokee Nation has any vested interest in the unallotted lands or the undistributed funds of the tribe.

The title to the unallotted lands is in the Cherokee Nation and not in the individual citizens. The patent issued by the President of the United States on December 31, 1838, conveyed the land to the "Cherokee Nation" (Rec., p. 28).

Section 2 of article 1 of the Cherokee constitution provides:

> The lands of the Cherokee Nation shall remain common property (Rec., p. 28).

This provision of the Cherokee constitution was amended on November 26, 1866, to read as follows:

> The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same in accordance with the provisions of article twenty of the treaty of nineteenth of July, eighteen hundred and sixty-six, between the United States and the Cherokee Nation (Rec., p. 28).

The national council of the Cherokee Nation by the act of September 28, 1905, creating the Cherokee commission (Rec., p. 23), and by joint resolution No. 1 (Rec., p. 24), instructing said commission, requested the allotment of the Cherokee lands and the distribution of the moneys among all citizens entitled thereto born prior to March 4, 1906.

It was held in the Cherokee Trust Funds case (117 U. S., 288) that whatever title the Cherokees have is in the tribe and not in the individuals, although held by the tribe for the common use and equal benefit of all members.

In the case of *Cherokee Nation vs. Journeycake* (155 U. S., 196), the court held:

> Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees or any of them.

In the case of *Cherokee Nation vs. Hitchcock* (187 U. S., 294), decided December 1, 1902, since the enactment of the act of July 1, 1902, providing for the allotment of the Cherokee lands, the court again reviews the treaties made with the Cherokees, discusses the title to their lands, and reaffirms and quotes from its former decisions holding that the title is in the nation and not in the individual citizens (*Delaware Indians vs. Cherokee Nation*, 193 U. S., 127).

The allotment act of July 1, 1902 (32 Stat., 716), does not change or individualize the title to the unallotted lands. Section 60 of that act provides:

> Any allottee accepting such patent shall be deemed to consent to the allotment and conveyance of all lands of the tribe as provided in this act and *to relinquish all his right, title, and interest to the same except in the proceeds of lands reserved from allotment.*

The "lands reserved from allotment" mentioned in said section are described in detail in section 24 of the same act and do not extend to unallotted tribal lands. Section 11 of the act of July 1, 1902 (32 Stat., 716), provided for the

allotment to each enrolled citizen "land equal in value to 110 acres of the average allottable land of the Cherokee Nation" only, and section 21 of said act made the allotment certificate "conclusive evidence of the right of the allottee to the tract of land described therein." No attempt was made in the act to individualize the unallotted lands, but the title was continued in the tribe.

All of these authorities are reviewed by the Court of Claims in its opinion in this case, and the court held that the title to the unallotted lands was in the tribe (Rec., p. 28).

Individual citizens have no vested rights in unallotted lands or tribal funds. This contention was pressed in the case of *Stephens vs. The Cherokee Nation* (174 U. S., 445), where certain applicants in the Cherokee Nation had been finally denied citizenship, and in the other nations admitted to citizenship under the act of June 10, 1896, by the United States court upon appeal. Congress having provided by an act approved July 1, 1898, for an appeal to the Supreme Court, the case was appealed, and upon this point the court said:

> "The mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship, is placed by the judgment of a lower court beyond the power of reorganization by a higher court, though subsequently authorized by general law to exercise jurisdiction."

And it was further held in the same opinion:

> "The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested

as to preclude inquiry into his status involved a contradiction in terms."

In the case of *Wallace vs. Adams* (143 Fed. Rep., 716) the defendant was admitted to citizenship in the Choctaw Nation by the United States court under the act of June 10, 1896, and by the Supreme Court upon appeal. The Atoka agreement providing for the allotment of lands of the Choctaw and Chickasaw nations, entered into April 23, 1897, was ratified by Congress June 28, 1898 (30 Stat., 495). Practically the only contention of the defendant was that he had been finally enrolled as a citizen of the Choctaw Nation; that he had taken possession of and improved a farm upon the public domain, *and that his right to the land became vested when the allotment agreement was ratified by Congress June 28, 1898.* An exhaustive opinion was rendered by the court in this case, and upon the question of *vested rights* the court held:

> "But *none of the authorities* cited contains a decision that one has a *vested right* in the judgment of citizenship which the legislative department of the United States may not lawfully disturb, although one of the ultimate consequences of such a judgment, if undisturbed, might be an interest in land and other property."

The Supreme Court upon appeal in this case (204 U. S., 415) sustained the decision of the Circuit Court of Appeals and quoted at length with approval its former decision in the Stephens case, *supra* (*Roff vs. Burney*, 168 U. S., 218).

The Court of Claims in its opinion said:

> "We must assume that Congress had some purpose in keeping alive the tribal government until March

4, 1906, and by subsequent acts continuing the same in full force for all purposes under existing laws until all the lands of the nation and the funds to its credit shall have been allotted and distributed. By these acts the Government asserted its continued guardianship until the final distribution of the common property; and under the authorities cited we think it cannot be successfully controverted that if before any allotments had been made under the act of 1902, Congress by amendment had inserted the date March 4, 1906, in lieu of September 1, 1902, allotments as of the latter date would have been valid and effective to bind all, as under the authorities cited, no rights could vest in severalty in communal property by the mere force of a statute. If they could, then, under the act of March 3, 1901, *supra*, they would have vested as of July 1, 1902, the date fixed by the Secretary of the Interior by authority of said act of 1901. But as before stated the case here proceeds upon the theory of the validity of the extension to September 1, 1902.

"Under the authorities cited we do not believe rights became vested in the Cherokees until there was an actual severance of the communal property and the issuance of a patent, and then only to the extent of the property therein actually conveyed to the allottees pursuant to law."

The Court of Claims further on in its opinion exhaustively reviews all of the provisions of the act of July 1, 1902, *supra*, calling attention to the fact that by section 11 of said act the Commission to the Five Civilized Tribes was limited in the allotment of lands to citizens:

> By section 11 of said act the Commission to the Five Civilized Tribes was not only limited in the allotments to "land equal in value to one hundred

> and ten acres of the average allottable lands of the Cherokee Nation," but section 18 of the act makes it unlawful, after ninety days from the date of ratification, "for any member of the Cherokee tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation;" and for any violation thereof he "shall be deemed guilty of a misdemeanor," punishable by fine of not less than $100 and "shall forfeit possession of any property in question."

Attention is also invited by the Court of Claims to the provision of section 72 of said act where it is made the duty of the Secretary of the Interior to collect a grazing tax upon cattle grazed "on lands not selected in allotment by citizens" for the benefit of the tribe. Thereupon the Court of Claims says:

> The act being silent as to the disposition of the unallotted lands, as the claimants concede, further legislation was necessary therefor—and this, also, the claimants concede; but they in effect say that Congress by the act of July 1, 1902, limited their power to allot such lands to any but the allottees under said act.
>
> The omission in the act to provide for unallotted lands was supplied by section 16 of the act of April 26, 1906, which, in substance, provides for the sale of any unallotted lands and the payment of the proceeds thereof into the Treasury of the United States to the credit of the tribe.
>
> Certainly Congress did not intend that rights should become vested in lands for the allotment or other disposition of which no provision was made in the act. Nor do we believe the language of the act

of 1902 is susceptible of such construction. It may be inferred that Congress, by section 5 of the act of April 26, 1906, as amended, providing that patents or deeds to allottees should be recorded "and when so recorded shall convey legal title," thereby intended that allottees should acquire legal title only after the patents or deeds to them, respectively, had been recorded.

Our contention is that the members of the tribe acquired only a vested right to the lands actually allotted to them, and that the title to the unallotted lands still remained in the tribe. (Conley *vs.* Ballinger, 216 U. S., 84, 90).

Hayes vs Banning 168 Fed Rep 221.

Nor did any title vest in the individual members of the tribe in the lands and funds under the act of July 1, 1902.

The appellants in the court below took the position that the Cherokee Nation had acquired a fee-simple title to its lands under the patent of December 31, 1838; that the tribe was dissolved by the act of July 1, 1902, and vested in the members of the tribe enrolled as of September 1, 1902, title to the tribal lands and funds, although unallotted or undistributed, which could not be disturbed by subsequent legislation. This position of the appellants utterly ignores the fact that on June 28, 1898, an allotment act was passed, under which a roll was begun on May 11, 1900, which, under the subsequent act of March 3, 1901 (31 Stat., p. 1073), authorized the Secretary of the Interior to fix the time for the closing of the Cherokee roll, which he did, and said roll was to be made as of date July 1, 1902. (Finding VI; Rec., p. 20). The making of this roll was continued under the amendatory act of July 1, 1902, *supra,* and was not completed until March 4, 1907, nearly a year after the acts of

April 26, 1906, and June 21, 1906, were passed. (Rec. p. 20.)

The act of July 1, 1902, was entitled to no greater weight than the acts of June 28, 1898, and March 3, 1901. As was said by this court in the Cherokee Intermarried White Cases (203 U. S., 76): "Counsel for claimants speak of the act of 1902 as a 'treaty,' but it is only an act of Congress, and can have no greater effect." Further the court said: "It is a singular commentary on the situation that the majority of the native Cherokees voted against its acceptance, which was carried by the vote of the whites."

Therefore, if the contention of the appellants is correct, they acquired vested rights under the act of June 28, 1898, which were afterwards divested by the act of July 1, 1902; and if the rights of individual members could have been properly interfered with by the act of 1902, it is difficult to understand why they could not be still further interfered with by the acts of April 26, 1906, and June 21, 1906. To make ourselves perfectly clear, the act of March 3, 1901 (31 Stat., 1073), gave the Secretary of the Interior authority to fix the closing of the tribal roll begun under the act of 1898, and he fixed the date as of July 1, 1902. Afterwards, by the act of July 1, 1902, *supra,* Congress itself fixed the date of the closing of the roll as September 1, 1902, and provided that none born after that date should participate in the distribution of the tribal lands and funds, thereby permitting the enrollment of children born between July 1, 1902, and September 1, 1902. If this could be legally done it is difficult to see why those born between September 1, 1902, and March 4, 1906, were not legally admitted to enrollment by the acts of April 26, 1906, and June 21, 1906. This was a remedial provision, for it is conceded that if the act of July 1, 1902, had not fixed the closing of the roll as of September 1, 1902, all of the children to whose enrollment the appellants have objected in this case, and even those born after March 4, 1906, would

have participated in the distribution of the Cherokee communal property at the final settlement. Not only this, but the closing of the roll on September 1, 1902, would have deprived the families of those Cherokees who were entitled to be enrolled on September 1, 1902, but who had died between that date and the ratification of the act on August 7, 1902.

As a matter of law, however, the title to the tribal lands was not changed in any respect by the act of July 1, 1902, as clearly shown by sections 58 and 59 of that act, which provided that the signature of the Principal Chief to the patent shall convey the interest of the nation, and the approval of the Secretary of the Interior shall serve as a relinquishment of the interest of the United States in the allotted lands.

The attorneys for the appellants have in effect contended, as it appears to us with more earnestness than reason, that the interest of the individual members of the nation in the tribal lands was that of tenants in common. This position has been rendered untenable by the decision in the case of *Fleming et al. vs. McCurtain et al., supra,* where it was held to be a communal interest.

The Court of Claims in its opinion said:

> "While it was within the power of Congress, by the act of July 1, 1902, to fix the date for enrollment prior to the time therein fixed for the termination of the tribal government, no sufficient reason, other than the act itself, can be urged therefor on either legal or equitable grounds, and this was doubtless the view of Congress when, by the acts of April and June, 1906, the time of enrollment was extended to the date fixed for the termination of the tribal government. This act is in harmony with the act of June 28, 1898 (30 Stat. L., 495, 513), respecting the Choctaw and Chickasaw nations, wherein it is provided that: 'It is further agreed that the Choctaws

and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States.'

"True, the acts of April and June, 1906, were passed after the date fixed for the termination of the tribal government, but their operation respecting those to be enrolled was limited to March 4, 1906. Hence but for these acts children of enrolled Cherokee parents under the act of July 1, 1902, though living during the existence of the tribal government, would have been denied their rights as communal owners in the common property; and it is no answer to say that the communal rights of the members of the nation in the lands were severed by the act of July 1, 1902, and thereby became vested as of the date of enrollment thereunder, for the tribal government was to continue until March 4, 1906, of which the allottees were bound to take notice; and so long as the tribal government existed no right as between themselves or as against the United States could vest in severalty in the common or unallotted property. In other words, nothing short of actual allotment in severalty, as provided by law, will give the individual members of the nation vested rights as against the United States. The act does not seek to divert the lands from the communal owners and give them to strangers, but merely extends the time for allotment so as to include and equalize allotments to all those living on the date fixed for the termination of the tribal government" (Rec., pp. 29 and 30).

Cherokee tribal lands and funds sufficient for all allotments.

There have been 5,610 children, born between September 1, 1902, and March 4, 1906, enrolled under the act of April 26, 1906, *supra*, as amended by the act of June 21, 1906, *supra*. There are also 3,800 allotments of tribal lands still remaining unallotted and over two millions of dollars of tribal funds in the Treasury of the United States, sufficient lands and funds for the allotment of all of these children without interfering with the allotments made under the act of July 1, 1902, to persons who were living on September 1, 1902.

All of these after-born children who cannot receive allotments of land are entitled to receive twice $325.60 or $651.20 (Finding 8, Rec., p. 21, and section 2 of the act of April 26, 1906, 34 Stat., 137).

It cannot, therefore, be successfully claimed that any lands which have already been allotted will be interfered with if these children are adjudged to be entitled to remain upon the rolls, and especially so in view of section 60, act of July 1, 1902, *supra*, where every allottee who received a patent assented to the allotment and conveyance of the tribal lands, as provided by the act, and relinquished his right, title and interest to the same, except the proceeds of certain lands reserved from allotment. The lands reserved from allotment were such as were reserved for schools and other public purposes by section 24 of the same act.

The Court of Claims in its opinion (Rec., p. 27) said:

> "After said allotments had been made there remained unallotted lands sufficient for about 3,800 such average allotments, which unallotted lands, together with the undistributed funds in the United States Treasury, to the credit of the Cherokee Nation—exceeding $2,000,000—are ample, as provided by the act of April 26, 1906, as amended to equalize

the allotments of all persons on the final or extended roll of Cherokee citizens as of March 4, 1906."

It will be seen, therefore, that our contention in this respect is conceded by appellants and upheld by the court, and that no lands actually allotted to any individual were affected by the acts of Congress complained of in this action.

The provision of the acts of April 26, 1906 (34 Stat., 137), and June 21, 1906 (34 Stat., 341, 342), for the enrollment of children born after September 1, 1902, was an agreement with the Cherokee Nation.

The provision incorporated into the act of April 26, 1906, as amended by the act of June 21, 1906, for the enrollment of minor children was really an agreement with the tribes through their accredited representatives. The Cherokee Commission was appointed by authority of an act of the Cherokee Council; was accompanied by the Principal Chief, W. C. Rogers, and was instructed by joint resolution to request the enrollment of minor children born on or prior to March 4, 1906, and living upon that date, and this commission followed these instructions and requested the enrollment of said minor children (Rec., p. 24). While the act of April 26, 1906, in so far as it provides for the enrollment of minor children, may have no greater effect than an act of Congress, it was really an agreement, and this act should be interpreted in the light of all the circumstances attending its enactment.

Not only was it the sense of the Cherokee National Council that the children born between September 1, 1902, and March 4, 1906, should be enrolled, but the Cherokee Nation through its authorized representatives requested both Congress and the Department of the Interior to insert the provision in question, and it was done at their request (Rec., p. 24).

In the case of *Wiggan vs. Conolly* (163 U. S., 56) the court sustained a second agreement extending the restrictive period upon the alienation of lands allotted and patented to minors, holding:

> "The land and the allottee were both still under the charge and care of the nation and the tribe, and *they could agree for still further protection, a protection which no individual was at liberty to challenge.*"

In this case the tribe and the Government have agreed to an extension of the time within which these children born since September 1, 1902, may be enrolled before the dissolution of the tribal government, and we earnestly contend, in the language of this court, that "no individual was at liberty to challenge" this agreement as incorporated in the act of April 26, 1906, *supra*. Much less have the claimants in this case the right to complain, as *their* only right to bring these suits is contained in the jurisdictional act which gave to them no greater rights than they already possessed.

The court in the case of *Stewart vs. The United States and the Osage Indians* (206 U. S., 185), said:

> "The passage of the act did not imply an admission that there was anything due the claimant. It simply provided for the presentation of his claim to the court and for a decision on the merits, *without assuming to say that he had any claim of a meritorious nature.*"

The Court of Claims in its opinion held:

> As set forth in Findings XI, XII, and XIII, said acts of April and June, 1906, were passed by Congress at the request and on the petition therefor of the representatives of the Cherokee Nation appointed therefor with the approval of the President of the

> United States (31 Stat. L., 1077), and, therefore, so far as the nation could act in behalf of its citizens in that respect their consent, if that were necessary, was given to said acts.

Appellants in their brief contend that they do not object to the provisions of the act of April 26, 1906, *supra*, standing alone, because, as they contend, it was not intended to apply to the Cherokee tribe, and insist that their objection lies only to the amendatory act of June 21, 1906. They contend that the following proviso, added to said section 2 of the act of April 26, 1906, was intended to make it inapplicable to the Cherokee tribe:

> "*Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States."

They insist that an agreement had been made with the Cherokee tribe, referring to the act of July 1, 1902, *supra*. They overlook the fact, however, that a similar provision had been incorporated into acts or agreements affecting all of the other Five Civilized Tribes. The proviso referred to in said section 2 was intended to refer to the provision added to section 1 of the act permitting the Secretary of the Interior to enroll upon the tribal rolls all persons whose applications were made prior to December 1, 1905, and was intended to refer to the applications of adults and not to minor children. This is clearly shown by investigating the legislative history of the act of April 26, 1906. Congress by the act approved March 3, 1905 (33 Stat., 1060), provided for the enrollment of the minor children in the Chickasaw, Choctaw, Creek and Seminole Nations born prior to and living on March 4, 1905. When the act of April 26, 1906, was introduced into the House of Representatives, section 2 of

the act only provided for the enrollment of the minor children of the enrolled parents of the members of the Five Civilized Tribes who were living on March 4, 1905, just as the act above referred to approved March 3, 1905 (32 Stat., 1060), had already provided for the enrollment of all minor children of the other Five Civilized Tribes, except the Cherokees. Therefore, it could not have been intended that this act as introduced into the House of Representatives was to exclude the minor children of Cherokees. This bill was introduced as H. R. 5976, and volume 40, part 2, page 1242, contains a discussion of the bill, and shows that it passed the House of Representatives with the date March 4, 1905, instead of March 4, 1906, and it was finally amended in the Senate. Mr. Curtis, on page 1242 of the above volume of the Congressional Record, said:

> "The Commissioner of Indian Affairs, the Secretary of the Interior and the Dawes Commission and the committee appointed by the Secretary of the Interior have carefully gone over the bill; in fact, prepared most of its provisions. It can be called a 'Department' bill."

See H.R. Report No 2347, 59 Cong. 1st Sess. Annual Rep. of

Certainly no one will contend that section 2 of the act of April 26, 1906, would have been prepared by the representatives of the Department of the Interior and intended to apply to the other four nations of the Five Civilized Tribes and not to the Cherokees, when Congress the year before, by the act of March 3, 1905, *supra,* had already provided for the enrollment of the minor children in those tribes.

The legislative history confirms the statement of the Court of Claims in Finding XIII (Rec., p. 24), that said section 2 of the act of April 26, 1906, *was passed at the request and upon the recommendation of the accredited representatives of the Cherokee Nation.* Fearing that there might be some ambiguity when the bill was finally engrossed and approved, the amendatory provision to free it of any doubt was incor-

porated into the Indian appropriation bill which was then pending, and was approved June 21, 1906.

The above record shows that the provision as originally drafted, while it embraced the other four nations of the Five Civilized Tribes, was intended only for the benefit of the minor Cherokee children. The amendment in the Senate changing the date from March 4, 1905, to March 4, 1906, provided for the enrollment of the minor children of the other tribes, the Seminoles excepted, as well as the Cherokee tribe up to March 4, 1906. *The minor children in all of the other Five Civilized Tribes, except in the Seminole Nation, who were living on March 4, 1906, have been enrolled and allotments made to them.*

Counsel for appellants, on page 17 of their brief, insist that the act under which the Cherokee Commission was appointed was not approved by the President of the United States, and therefore the commission was illegal. The attention of the court is invited to Finding XI (Rec., p. 23) of the Court of Claims, wherein it is found as a fact that the act of the Cherokee Council approved by the Principal Chief on September 28, 1905, under which the Cherokee Commission was appointed, was approved by the President of the United States November 7, 1905, and this commission was "appointed in conformity with section 3, article 6, of the Constitution of the Cherokee Nation," and was "authorized to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs and all other relations with the United States of America, except as to all the matters now pending in the courts of the United States."

Said section 3, article 6, of the Cherokee Constitution, provides:

> When the National Council shall determine the expediency of appointing delegates or other public agents for the purpose of transacting business with

> the Government of the United States, the Principal Chief shall recommend and, by the advice and consent of the national committee, appoint and commission such delegates or public agents accordingly.

The name of the upper branch of the Cherokee Council was changed from "national committee" to "senate" by section 1 of the amendments to article 3, Cherokee Constitution, adopted November 26, 1866, which reads as follows:

> The upper house of the National Council, known as the national committee, shall be hereafter known and styled "the senate of the Cherokee Nation."

Finding XIII (Rec., p. 24) shows that this commission, accompanied by the Principal Chief and National Attorney for the Cherokee Nation, "came on to Washington on November 21, 1905, *and conferred with the representatives of the Interior Department, the Commissioner of Indian Affairs and the House and Senate Committees on Indian Affairs, and at the request and recommendation of said Cherokee Commission, section 2 of the act of April 26, 1906,*" was passed, the joint resolution of the Cherokee National Council, instructing the commission in detail, as set forth in Finding XII (Rec., p. 24).

These findings of the Court of Claims conclusively show that the Cherokee Commission was legally appointed and had the authority to represent the Cherokee tribe. The Court of Claims was fully justified in its fifth conclusion of law that:

> Section 2 of the act April 26, as amended by the act June 21, 1906, was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation, as instructed by the National Council of the Cherokee Nation, with the approval of the President of the United States, as set forth in Findings XI, XII, and XIII.

The power of Congress to administer upon the affairs of dependent Indian tribes is plenary.

But if the act of April 26, 1906, *supra,* as amended by the act of June 21, 1906, *supra,* be found by the court not to have the effect of an agreement, we insist that Congress had the power to enact the legislation.

The Government changed its policy toward the Indian tribes on March 3, 1871 (16 Stat., 544). Prior to that time treaties were negotiated with them, but a provision was inserted in the act of that date, now section 2079 of the Revised Statutes, declaring the intention of Congress to thereafter abandon its former policy of negotiating treaties and to exercise authority over them by direct legislative enactments. This policy was justified and sustained by the courts upon the theory that the Indians of all tribes were wards of the Government of the United States, and while they were recognized as distinct political communities, yet they were in a condition of pupilage or dependency and subject to the paramount authority of the United States (*Cherokee Nation vs. Hitchcock,* 187 U. S., 294).

The court held in the case of *Cherokee Nation vs. Southern Kansas Railway Company* (135 U. S., 641), speaking of the Cherokees, as follows:

> From the beginning of the Government to the present they have been treated as "wards of the nation," "in a state of pupilage," "dependent political communities," holding such relations to the General Government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation vs. Georgia* (5 Peters, 1, 17), "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with

> them, would be considered by all as an invasion of our territory and an act of hostility."

And the court further held in that case:

> The Cherokee Nation is not sovereign in the sense that the United States or a State is sovereign, but is now, as heretofore, a dependent political community *subject to the paramount authority of the United States.* (*Stephens vs. Cherokee Nation,* 174 U. S., 445; *Worcester vs. Georgia,* 6 Peters, 515; *Choctaw Nation vs. United States,* 119 U. S., 1; *Jones vs. Meehan,* 175 U. S., 1; *United States vs. Kagama,* 118 U. S., 375; *United States vs. Rickert,* 188 U. S., 432; *Lone Wolf vs. Hitchcock,* 187 U. S., 553; *Roff vs. Burney,* 168 U. S., 218.)

Because of the fact that all Indian tribes or nations are regarded as dependent communities or wards of the Government, the courts are reluctant, particularly since Congress, in 1871, announced its change of policy in dealing with the Indians by direct legislation, to interfere with their control by Congress. In the case of *Cherokee Nation vs. Hitchcock* (187 U. S., 294) the court, speaking through Mr. Justice White, on December 1, 1902, said:

> The plenary power or control by Congress over the Indian tribes and its undoubted power to legislate, as it has done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed,

referring to the case of *Stephens vs. Cherokee Nation* (174 U. S., 445). The court closes the opinion with the following sweeping language:

> The power existing in Congress to administer upon and guard the tribal property, and the power being

> political and administrative in its nature, the manner of its exercise *is a question within the province of the legislative branch to determine, and is not one for the courts.*

In the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553), decided by the court as late as January 5, 1903, it was held:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, *and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government.* Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties and of course a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into upon its behalf. But, as with treaties made with foreign nations (Chinese Exclusion case, 130 U. S., 581, 600), the legislative power might pass laws in conflict with treaties made with the Indians.

In the above case Congress, openly in violation of existing treaties with the Indians, by direct legislation provided in detail for the allotment of the lands of the Indians, the sale of their surplus lands, and the disposition of the proceeds derived therefrom, upon the theory that they were wards of the Government. In concluding its opinion in that case the court used the following language, indicating that there was no limit to the plenary power of Congress over Indian tribes, and that the courts would not interfere with the discretion of Congress:

> We must presume that Congress acted in perfect good faith in the dealing with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in

> the premises. In any event, *as Congress possesses full power in the matter, the judiciary can not question or inquire into the motives which prompted this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.* The legislation in question was constitutional and the demurrer to the bill was therefore rightly sustained. (*Stephens vs. Cherokee Nation*, 174 U. S., 445.)

The same principle has been repeatedly enunciated by the court. *In re Heff* (197 U. S., 488), the court, after discussing the relation of guardian and ward between the United States and Indian tribes and the plenary power of Congress over them, citing numerous authorities, held:

> *It is not within the power of the courts to overrule the judgment of Congress.* It is true there may be a presumption that no radical departure is intended, and courts may easily insist that the purpose of Congress be made clear by its legislation, *but when that purpose is made clear the question is at an end.*

In the case of *United States vs. Rickert* (188 U. S., 432), commenting upon the exclusive authority of Congress over Indians, the court, through Mr. Justice Harlan, said:

> It is for the legislative branch of the Government to say when these Indians shall cease to be dependent or assume the responsibility attaching to citizenship. That is a political question which the courts may not determine. (*Wallace vs. Adams*, 204 U. S., 415.)

In the case of *United States vs. Rogers* (4 How., 567), the court held:

> The country in which the crime is charged to have been committed is a part of the territory of the United States and not within the limits of any particular State. It is true it is occupied by the Cherokee Indians. But it has been assigned to them by the United States as a place of domicile for the tribe and *they hold with the assent of the United States and under their authority.* (*United States vs. Kagama,* 118 U. S., 375; *Talton vs. Mayes,* 163 U. S., 376.)

The latest decision of the Supreme Court was in the case of *Starr vs. Campbell,* decided February 24, 1908, wherein the court said:

> It must at the outset be kept in mind that a policy of control over the Indians has always been observed by the Government. The many exercises of this policy which have been sustained by this court we need not stop to comment on.

The court in the case of *Thomas vs. Gay* (169 U. S., 264) held:

> *The unlimited power of Congress* to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations may be conceded.

The Court of Claims in its opinion, after reviewing a number of authorities, held:

> But independent of such treaties and their acknowledgment, the Cherokees and other Indians have been, since our Government was organized, subject to the paramount authority of the United States, exercised by Congress; and they and the territory occupied by them being within the geographical lim-

its of the United States have at all times been subject to the laws of Congress enacted for their protection as well as for the protection of the people with whom they come in contact (*Worcester vs. Georgia,* 6 Pet., 515). In other words, the United States, had they so elected, might from the first, without the consent of the Indians, have controlled them and their tribal property by acts of Congress instead of by treaties (*United States vs. Kagama,* 118 U. S., 375, 379). And the purpose to control them by acts of Congress instead of by treaties was indicated by the act of March 3, 1871 (now Rev. Stat., sec. 2079).

Referring to that section the court, in the *Matter of Heff* (197 U. S., 488, 498), said: "From that time on the Indian tribes and the individual members thereof have been subject to the direct legislation of Congress, which, for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life."

Further, in commenting on the power of Congress in that same case, the court, quoting from the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553, 565), said: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government."

And after quoting numerous authorities in support of that holding and other authorities looking to the protection of the Indians, the court said: "But none of the decisions affirming the protection of the Indians questioned the full power of the Government to legislate in respect to them."

Furthermore, in the case of the *Cherokee Nation vs. Hitchcock* (187 U. S., 294) the court held, in effect, that Congress, by the act of June 28, 1898,

> "practically assumed the full control over the Cherokees as well as the other nations constituting the Five Civilized Tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property." (See also *Delaware Indians vs. Cherokee Nation,* 193 U. S., 127.)
>
> To the same effect also is the case of *Wallace vs. Adams* (204 U. S., 415) respecting citizenship in the Indian tribes.

The above authorities abundantly sustain the sixth conclusion of law held by the Court of Claims:

> The Congress have plenary power to guard, protect, and administer upon the tribal property of the Cherokee Nation, and that power is political, and is for the legislative branch and not for the courts to determine.

Attention here is again invited to the fact that no provision was made in the act of July 1, 1902, *supra,* for the disposition of the unallotted lands belonging to the Cherokee Nation, but that is found in sections 16 and 17 of the act of April 26, 1906. Appellants, however, concede this conclusion of law on page 22 of their brief in the following language:

> "Having plenary power over tribal property, as numerous decisions declare, it could provide for its distribution if the Indians were at the time in tribal relations (*Lone Wolf vs. U. S.,* 187 U. S., 553, 565).

Lujan vs Colorado 164 Fed Rep 670

Character of Title Immaterial.

Nor does the difference in the character of title held by the Indian tribes to their lands in any manner or degree change, alter, or diminish the power of Congress over them

or their tribal property. This power is the same in all cases—*plenary*.

Whether the fee title to the land is in the United States, as is the case with most Indian land, and held in trust for the Indians, or whether it had been allotted, as was the case in *United States vs. Rickert* (188 U. S., 432) and the case of the Kansas Indians (5 Wall., 737), or whether the fee title had been conveyed by patent by the United States to the tribe for the common use and benefit of all, subject only to the possibility of reversion as stipulated in the patent, as in the case of the lands of the Five Civilized Tribes, the courts have made no distinction as to the paramount authority of Congress. (*Cherokee Nation vs. The Southern Kansas Railway Co.*, 135 U. S., 641; *Stephens vs. Cherokee Nation*, 174 U. S., 445; *Cherokee Nation vs. Hitchcock*, 187 U. S., 294; *Choctaw Nation vs. United States*, 119 U. S., 1.)

From an examination of these cases it will be observed that the Supreme Court, upon the question of the power of Congress over Indian tribes, cites with approval decisions in Indian cases without reference to the character of the title held by the tribe.

The appellants insist that the difference in the title held by Indian tribes conditions the power of Congress to legislate with respect to their lands.

Mr. Justice White delivered the opinion of this court in the cases of the *Cherokee Nation vs. Hitchcock* (187 U. S., 294) and *Lone Wolf vs. Hitchcock* (187 U. S., 555), and no distinction was made as to the plenary power of Congress over the Indian tribes affected because of the character of the title held by the respective tribes. The Lone Wolf case was decided after and upon the authority of the case of *Cherokee Nation vs. Hitchcock*. The same supreme authority of Congress was upheld by this court in the case of *Stephens vs. The Cherokee Nation* (174 U. S., 445).

Indians Made Citizens of the United States Immaterial.

It is not material that petitioners became citizens of the United States under the act of March 3, 1901 (31 Stat., 1447). The Government of the United States did not thereby lose control over their tribal property. The courts have uniformly held that as long as a nation of Indians was recognized in their tribal capacity by the political department of the United States they were under the supervisory control of Congress. (The Kansas Indians, 5 Wall., 756, 757; *Jones vs. Meehan*, 175 U. S., 1, and cases cited.)

In the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553) the court held:

> That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw vs. United States* (119 U. S., 1, 27) and *Stephens vs. Cherokee Nation* (174 U. S., 445, 483).

The court in passing upon this very question in the case of *United States vs. Rickert* (188 U. S., 432) says:

> It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. *These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question which the courts may not determine.*

In *Farrel vs. United States* (110 Fed. Rep., 942) it was held:

> *It is a settled rule* of the judicial department of the Government, in ascertaining the relations of Indian tribes and their members to the nation, *to follow the action of the legislative and executive departments to which the determination of these questions has been especially intrusted.* (*United States vs. Holliday*, 3 Wall., 407; *U. S. vs. Earl*, 17 Fed. Rep., 75, 78.)

The mere fact that the Indian had taken an allotment and been made a citizen of the United States did not end his status of wardship or limit or end the power of superintendence and protection of the Government of the United States. (*Hitchcock vs. Bigboy*, 22 Appeal Cases D. C., 275; *Farrell vs. United States*, 110 Fed., 942; *Beck vs. Flournoy Co.*, 65 Fed., 30; *Pilgrim vs. Beck*, 69 Fed. Rep., 895; *U. S. vs. Flournoy*, 71 Fed., 576; *U. S. vs. Mullin*, 71 Fed., 682.)

The Circuit Court in the case of *Ross vs. Eels* (56 Fed. Rep., 855) sustained the contention that members of the Puyallup tribe in the State of Washington to whom allotments had been made and who were made citizens of the United States and of the State when the State was admitted into the Union, were emancipated from the control of the Government of the United States, but upon appeal the Circuit Court of Appeals (64 Fed. Rep., 417) reversed the decision of the lower court, holding:

> The act of February 8, 1887, which confers citizenship, does not emancipate the Indians from all control or abolish the reservation.

The case was appealed to the Supreme Court but dismissed (163 U. S., 702.)

But the act of March 3, 1901 (31 Stat., 1447), conferring citizenship upon the Indians in the Indian Territory was

only an amendment to the act of February 7, 1887, by inserting in said act the words, "and every Indian in Indian Territory." There was no intention on the part of Congress to lessen or diminish the authority of the Government of the United States over the other Indian tribes by the act of March 3, 1901. And therefore, all decisions cited to the effect that that act did not emancipate the other Indian tribes from governmental supervision are pertinent.

Nor is there anything in the Heff case in conflict with the other authorities cited herein. In that case the court reviewed at length the history of Indian legislation and prior decisions of the court. Construing the Kickapoo treaty in connection with the act of 1887 granting citizenship to Indian allottees, the court held that Congress had the power and by the language did relinquish guardianship over the Indians, and that they were subject to the police regulations of the State. But the court was careful to point out that their being made citizens of the United States and of the State in no way interfered with the control over and protection by Congress of their property rights. And it further held:

> In *construing a statute* affecting the relationship of the Government and the Indians, *it is not within the power of the courts to overrule the judgment of Congress.*

In the case of *McKay vs. Kalyton* (204 U. S., 458) the court, on February 25, 1907, reaffirmed the Rickert case and distinguished between that case and the Heff case.

A review of this entire question by the court is found in the case of *Dick vs. United States,* decided by the Supreme Court of the United States February 24, 1908 (208 U. S., 340-359).

The last expression of this court is in the case of *United States vs. Celestine* (215 U. S., 276), where the court reviews many of its previous decisions, and discussed at length the Heff case, holding that conferring of citizenship upon

the members of an Indian tribe did not emancipate them from the control of the Government of the United States, unless the act conferring citizenship so stated in explicit terms.

There could have been no intention to emancipate the Indians of the Five Civilized Tribes from the control of Congress by the act of March 3, 1901, for their citizenship rolls were not completed, none of their lands had been allotted, they were not then within the boundary of any State, and therefore were not subject to the jurisdiction of any State court, but, except for the authority reserved to their tribal councils and officers, were controlled exclusively by acts of Congress and the Department of the Interior, and were under the jurisdiction of the courts of the United States, provided for by Congress for that country.

However, the court in the case of *Cherokee Nation vs. Hitchcock* (187 U. S., 294), on December 1, 1902, decided that the act of March 3, 1901, granting citizenship to the Indians in the Indian Territory *did not emancipate* them from the control of the Government of the United States, in the following language:

> There is no question in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government, *even though the members of the tribe have been invested with the status of citizenship under recent legislation.*

If the contention of counsel for appellants to the effect that the act of March 3, 1901 (31 Stat., 1073) conferring citizenship upon the Indians completely emancipated them and their property from the guardianship and control of Congress, then every act of Congress, including the acts of July 1, 1902, *supra*, April 26, 1906, June 21, 1906, and the juris-

dictional act under which this suit is brought and the subsequent completion of the rolls and the allotment of the lands are invalid. The act of March 3, 1901, *supra,* was as much in force when the act of July 1, 1902, *supra,* was passed as when the acts of April 26, 1906, as amended by the act of June 21 1906, *supra.*

This court, in the Stephens case (174 U. S., 415), held in effect that Congress by the act of June 28, 1898, had practically assumed full control over the Indian tribes and their property. That decision was rendered May 15, 1899, prior to the passage of the act of March 3, 1901, *supra.* Since the passage of that act this court, in the case of *Cherokee Nation vs. Hitchcock* (187 U. S., 294), decided December 1, 1902, reaffirmed that decision.

History of Enrollment Legislation and the Closing of the Rolls.

Congress by an amendment to the Indian appropriation act approved March 3, 1893 (27 Stat., 612, 645), provided for the appointment of three commissioners to negotiate agreements with the Five Civilized Tribes for the purpose of extinguishing the tribal title to their lands either by cession to the United States in whole or in part or by allotment among the citizens of the respective tribes entitled thereto. This commission was officially designated "The Commission of the Five Civilized Tribes," but was commonly known as the "Dawes Commission" because its first chairman was ex-Senator Henry L. Dawes, long a member of the Indian Senate Committee and closely identified with Indian legislation. Two additional members were added to this commission by act of March 2, 1895 (28 Stat., 939). Complaint having been made that the respective nations and their tribal courts or citizenship commissions were prejudiced against disputed applicants for citizenship, by an amendment to the Indian appropriation act approved June

10, 1896, in addition to the authority theretofore conferred upon it by law, the Commission was authorized to hear and determine "the applications of all persons who may apply to them for citizenship in any of said nations," and the right of appeal was provided for from the decision of the commission to the United States court either on behalf of the tribe in which citizenship was sought or by the applicant.

By act of July 1, 1898 (30 Stat., 591), an appeal was provided for direct to the Supreme Court of the United States.

All applications for admission to citizenship having been presented and decided or pending upon appeal and the commission having failed thus far of its primary purpose to negotiate agreements with the respective nations looking to a dissolution of their tribal governments and allotment of their lands, Congress by section 21 of an act approved June 28, 1898 (30 Stat., 495), directed the commission to prepare a complete roll which should include all of the recognized or admitted citizens of the respective tribes and their descendants, instructing said commission in detail with great particularity how said roll should be prepared, because, as stated in said section, "the rolls so made when approved by the Secretary of the Interior shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

The commission was further instructed by an act approved May 31, 1900 (31 Stat., 221), "not to receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in the Indian Territory who has not been a recognized citizen thereof and duly and lawfully enrolled or admitted as such."

By the act of March 3, 1901 (31 Stat., 1073), Congress authorized the Secretary of the Interior to fix a date for the

closing of the roll, as it had the power to do under the plenary authority exercised by Congress over Indian tribes (*Cherokee Nation vs. Hitchcock,* 187 U. S., 294; *Lone Wolf vs. Hitchcock,* 187 U. S., 553; Stephens case, 174 U. S., 445).

The Secretary of the Interior, acting under the authority of the above act, fixed the date for the closing of the Cherokee roll on July 1, 1902, and the roll was actually closed upon that date, and remained closed until after the ratification of the act of July 1, 1902, by the Cherokee people on August 7, 1902, which was promulgated August 12, 1902 (Rec., p. 20). The report of the Commission to the Five Civilized Tribes for the year ending June 30, 1902, contains the following:

> "Much difficulty having been experienced by the commission in effecting agreements with the several tribes which should enable the citizenship rolls to be closed, Congress, in the Indian appropriation bill of March 3, 1901 (31 Stat., 1073), embodied legislation calculated to overcome this obstacle. The provision referred to is as follows:
>
> "* * * 'The Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes, or either of them, for closing said roll, but upon failure or refusal of said tribes, or any of them, to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no names shall be added thereto.'
>
> "It will be remembered that up to that date all efforts to consummate an agreement with the Cherokees had failed, and while agreements had been made with the other four tribes, that with the Choctaws and Chickasaws did not cover this important feature.
>
> "In November, 1901, under instructions from the department, the commission renewed its effort to

> negotiate an agreement with the Cherokees fixing the date for closing their rolls. Being unsuccessful at that time, a further effort was made in December, 1901, also without result. Thereupon the Secretary, acting under the provision of law above quoted, on January 15, 1902, *directed the commission to receive no applications for enrollment as Cherokee citizens after July 1, 1902.*" (Italics ours.)

However, the prerequisites recited in the official order of the Secretary of the Interior are presumed to be true in the absence of proof to the contrary (*Nofire vs. United States,* 164 U. S., 657).

Section 25 of the act of July 1, 1902 (32 Stat., 716), *extended the date of closing the Cherokee roll to September 1, 1902.* Commenting upon the closing of the rolls and of the extension of the time as provided by said section 25, the Commission to the Five Civilized Tribes, in its annual report for June 30, 1903, says:

> "As *this extended the date which had previously been fixed* by the Secretary of the Interior for the closing of the Cherokee rolls, the commission *resumed the hearing of original applications* for enrollment immediately after the ratification of the *agreement was proclaimed.* Between that date, however, and the date upon which the rolls were finally closed *but few applications were received.*" (Italics ours.)

The closing of the roll under the above act of Congress is referred to by this court in the case of *Garfield vs. Goldsby* (211 U. S., 249) as follows:

> "By the act of March 3, 1901 (31 Stat. L., 1077, c. 832), it was provided that the roll made by the Commission to the Five Civilized Tribes as approved

> by the Secretary of the Interior should be final, and authorized the Secretary of the Interior to fix the time, by agreement with the tribes, for the closing of the roll, and upon failure of such agreement, then the Secretary of the Interior should fix the time for the closing of the rolls, and after which no name should be added thereto."

If Congress had the authority, and we contend that it had, to extend the time for the closing of the Cherokee roll by section 25 of the act of July 1, 1902, to September 1, 1902, then it also had the authority by section 2 of the act of April 26, 1906, as amended by act of June 21, 1906, to extend the closing of the roll to March 4, 1906.

But it is urged that the act of July 1, 1902 (32 Stat., 716), was ratified by the Cherokee people and that it was an agreement. The Supreme Court held in the Cherokee Intermarriage cases (203 U. S., 76), commenting upon this same contention, as follows:

> "Counsel for claimants speak of the act of 1902 as a 'treaty,' *but it is only an act of Congress,* and can have no greater effect."

Even if the act of July 1, 1902, because it was ratified by a vote of the citizens of the Cherokee Nation, should be held to be an agreement, still the citizens have no vested rights to enrollment or to unallotted lands or tribal moneys, and Congress could have amended or repealed it whether it be construed as "only an act of Congress," an agreement, or a treaty (Cherokee Tobacco case, 11 Wall., 621; *Lone Wolf vs. Hitchcock,* 187 U. S., 553; *Thomas vs. Gay,* 169 U. S., 264).

Ratification of the act was only necessary because it was one of the conditions imposed by the act. But as decided in the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553), Congress could have omitted the condition and no ratification

would have been necessary, and the act would have been a valid exercise of power.

If the act of July 1, 1902, is "only an act of Congress," and by that act the time for closing the Cherokee roll extended from July 1, 1902, to September 1, 1902, why would not Congress by section 2 of the act of April 26, 1906, as amended by the act of June 21, 1906, have the authority upon the petition and at the request of the Cherokee Nation to further extend the time for the closing of the Cherokee roll to March 4, 1906? If Congress by act could extend the date for closing the roll to September 1, 1902, it could extend it, as it afterwards, on April 26, 1906, did, to March 4, 1906. In fact, it could have, in the first place, extended it to March 4, 1906, and if so, why did it not have the authority to so extend it by a subsequent act?

The Court of Claims in its opinion (Rec., p. 27) held that by virtue of the act of March 3, 1901, *supra*.

> "The Secretary of the Interior was authorized to and did fix the time for the enrollment as of July 1, 1902, which date was extended by said act of July 1, 1902, to September 1, 1902."

And, further commenting upon the power of Congress to extend the date as of which the Cherokee roll should be made, held:

> "If they could, then, under the act of March 3, 1901, *supra,* they would have vested as of July 1, 1902, the date fixed by the Secretary of the Interior by authority of said act of 1901. But as before stated, the case here proceeds upon the theory of the validity of the extension to September 1, 1902."

In other words, if the act of April 26, 1906, as amended by the act of June 21, 1906, is unconstitutional because of the extension of the date as of which the Cherokee roll was to be made from September 1, 1902, to March 4, 1906, then

the act of July 1, 1902, is also unconstitutional, because it extended the date as of which the roll should be made from July 1, 1902, to September 1, 1902, for the reason that, as above stated, this court held in the Intermarried White cases (203 U. S., 76) that said act of July 1, 1902, "is only an act of Congress and can have no greater effect."

Appellants Only Represent Themselves.

The appellants in this case do not represent the enrolled members of the Cherokee Nation. They have shown no authority to represent any persons except themselves and are only authorized by the jurisdictional act to institute this suit. The question therefore presented by the act is in reality a moot question, for the children born between September 1, 1902, and March 4, 1906, were admitted at the request of the Cherokee Nation through its council.

(1) The history of Indian tribes in this country shows conclusively that all full-blood Indians are in favor of communal ownership so as to preserve homes for their posterity. This is particularly true of the Cherokee Indians. Section 2, article 1, of the Cherokee constitution provides that "the lands of the Cherokee Nation shall remain common property."

(2) The record in the case of Brown and Gritts shows that the full-blood Cherokees were opposed to the enrollment and allotment of their tribal lands, and in fact were opposed to the passage of the allotment act of July 1, 1902, which is a direct contradiction of the contention that they desire the exclusion of their children in order that their individual shares may be increased, for in communal property all members of the tribe living at the date of its distribution are entitled to share equally.

(3) The Cherokee Nation is and always has been recognized as a distinct political community (193 U. S., 127),

and the National Council, elected by the people an act approved December 4, 1903 (Rec., pp. 155, 156), and by joint resolution approved September 29, 1905 (Rec., pp. 23, 24), requested the enrollment of minor children born since September 1, 1902, and their enrollment was provided for at the request of the accredited representatives of the Cherokee Nation.

(4) The Cherokee Nation has filed a petition of intervention in this case, and represents all of its citizens (Rec., pp. 12, 18).

(5) The record in this case shows that the citizens of the Cherokee Nation are practically unanimous for the enrollment of these minor children (Rec., p. 24).

(6) The Cherokee Nation, anticipating that its tribal government would expire on March 4, 1906, as provided by the act of July 1, 1902, *supra*, and that all of its members, like the heirs of an estate, should share in the tribal property upon the date of the death of the nation, enacted the joint resolution of the National Council to which we have several times referred.

(7) In conclusion, we challenge the right of these appellants to represent the members of the Cherokee Nation, or any of them, without the consent of the nation, over its protest and against its will.

We submit that under the law and the facts, as set forth in this brief, the act should be held constitutional and the judgment of the Court of Claims affirmed.

WILLIAM W. HASTINGS,
National Attorney for the Cherokee Nation.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

DAVID MUSKRAT AND J. HENRY DICK, on their own behalf, etc., appellants,
v.
THE UNITED STATES.
No. 330.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The above-entitled case is a suit specially authorized to be brought against the United States by the act of March 1, 1907 (ch. 2285, 34 Stat., 1015, 1028), (hereafter referred to as the jurisdictional act), to determine the validity of section 2 of the act of April 26, 1906 (ch. 1876, 34 Stat., 137, 138), as amended by the act of June 21, 1906 (34 Stat., 325, 341, 342), in so far as it attempts to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, the date pre-

viously fixed by Congress for closing the roll of citizens for that nation.

The only respect here pertinent in which the above-mentioned section, as amended, attempted to increase the number of said persons, was by permitting the enrollment of children who were minors living on March 4, 1906, whose parents had theretofore been enrolled as members of the Cherokee tribe, or had applications pending therefor at the date of the approval of the act. The above-mentioned section, as amended, was passed at the urgent solicitation of the Cherokee Nation (R., 23, 24), and there remain enough unallotted lands and undistributed funds in the Treasury of the United States belonging to the Cherokee Nation to provide the minor children above referred to with allotments or their equivalent (R., 21, 22). And said children to the number of 5,610 have been duly enrolled as provided by the section, but their allotments are held up pending the determination of this suit.

The constitutionality of the amended section is attacked upon the ground that Congress, having, by the act of July 1, 1902 (ch. 1375, 32 Stat., 716, 720, 721), fixed September 1 as the date for finally closing the roll of Cherokee citizens, was not at liberty to revise or supplement that roll so as to include the children above referred to. The alleged inability of Congress to do so is supposed to arise out of the provisions of the act of July 1, 1902 (32 Stat., 716), when taken in connection with the so-called citizen-

ship act of March 3, 1901 (ch. 868, 31 Stat., 1447), amending section 6 of the act of February 8, 1887 (ch. 119, 24 Stat., 388, 390).

It is important here to note chiefly, as indicating the interest which the Cherokee Nation has in protecting the interests of the minor children of that nation who are permitted by the act of June 21, 1906, supra, to share in the distribution of the lands and funds of said nation, that the Cherokee Nation intervened in the Court of Claims on the ground "that the Cherokee Nation is the party directly interested in the determination of this suit, and the United States is only nominally interested therein, and the Cherokee Nation desires the constitutionality of section 2 of the act of April 26, 1906, as amended by the act of June 21, 1906, sustained by the court," etc. (R., 17.)

The United States denied each and every allegation contained in the petition (R., 12). The judgment of this court, therefore, is to be based solely upon the finding of facts by the Court of Claims and the pertinent provisions of law applicable thereto.

In this brief we shall set out—

First. The pertinent provisions of all the acts involved.

Second. The important findings of fact by the Court of Claims.

Third. The argument for the Government, in which it will be contended (*a*) that the case is moot; (*b*) that upon the merits the judgment of the court below should be affirmed and the petition dismissed.

The Pertinent Provisions of the Acts Involved.

The jurisdictional act of March 1, 1907 (34 Stat., 1015, 1028), provides in part as follows:

> That * * * David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any Acts of Congress passed since the said Act of July first, nineteen hundred and two, in so far as said Acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrances, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said Act of July first, nineteen hundred and two.
>
> And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine and adjudicate each of said suits.
>
> The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and

by the Attorney-General, who is hereby charged with the defense of said suits.

Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of the said Acts, authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said Act of July first, nineteen hundred and two.[a]

Section 2 of the act of April 26, 1906 (ch. 1876, 34 Stat., 137, 138), provides in part as follows:

That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe

[a] NOTE.—It is worthy of note that if the contention of the appellant's counsel that Congress had no power, after the final closing of the roll of the Cherokee citizens, as provided in the act of July 1, 1902, to dispose of the unallotted property or any portion of it to others than those so enrolled is sound, the provision providing for the payment of counsel is unconstitutional for the same reason.

> shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. * * * *Provided*, That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date.

The amendatory act of June 21, 1906 (ch. 3504, 34 Stat., 325, 341, 342), provides:

> That section two of the Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, be, and the same is hereby amended by striking out thereof the words "*Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided further*, That nothing herein shall apply to the intermarried whites in the Cherokee Nation whose cases are now pending in the Supreme Court of the United States." And insert in said Act in lieu of the matter repealed, the following: *Provided further*, That nothing herein shall be construed so as hereafter to permit any person to file an application for enrollment or to be entitled to enrollment in any of

said tribes, except for minors the children of Indians by blood, or of freedmen members of said tribes, or of Mississippi Choctaws identified under the fourteenth article of the treaty of eighteen hundred and thirty, as herein otherwise provided, and the fact that the name of a person appears on the trial roll of any of said tribes shall not be construed to be an application for enrollment.

The act of July 1, 1902 (ch. 1375, 32 Stat., 716, 717, 720, 721), provides in part as follows:

SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

SEC. 12. For the purpose of making allotments and designing homesteads hereunder, the forty-acre, or quarter of a quarter section, subdivision established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment,

designate as a homestead out of said allotment land equal in value to forty acres of the average allotable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this Act.

SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

SEC. 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said Commission to make said selection and designation.

SEC. 17. In the making of allotments and in the designation of homesteads for members of said tribe, said Commission shall not be required to divide lands into tracts of less than the smallest legal subdivision provided for in section twelve hereof.

SEC. 18. It shall be unlawful after ninety days after the ratification of this Act by the Cherokees for any member of the Cherokee tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation, either for himself or for his wife, or for each of his minor children, if members of said tribe; and any member of said tribe found in such possession of lands, or having the same in any manner inclosed after the expiration of ninety days after the date of the ratification of this Act shall be deemed guilty of a misdemeanor.

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this Act. * * *

SEC. 63. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

SEC. 74. This Act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following:

The appropriation act of March 3, 1901 (ch. 832, 31 Stat., 1058, 1077), provides in part as follows:

> The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the In-

terior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto.

The joint resolution of March 2, 1906 (34 Stat., 822), provides:

> That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law.

Section 28 of the act of April 26, 1906 (34 Stat., 137, 148), provides as follows:

> That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: Provided, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of

any validity until approved by the President of the United States: Provided further, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

The act of February 8, 1887 (ch. 119, 24 St., 388, 390, 391), provides in part as follows:

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of

any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

* * * * *

That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory.

The so-called citizenship act of March 3, 1901 (ch. 868, 31 Stat., 1447), provides as follows:

That section six of chapter one hundred and nineteen of the United States Statutes at Large numbered twenty-four, page three hunddred and ninety, is hereby amended as follows, to wit: After the words "civilized life," in line thirteen of said section six, insert the words "and every Indian in Indian Territory."

Important Findings of Fact in the Court of Claims.

It will be noted that many of the findings stated below, as well as those omitted, are mere conclusions of law, based on various statutes and treaties.

By an act of Congress approved March 3, 1893 (27 Stat., 645), a commission, afterwards designated as the Commission to the Five Civilized Tribes, was appointed to negotiate agreements with the Five Civilized Tribes, including the Cherokee Nation, for the allotment of the lands in severalty of the Cherokee Nation, and the authority of said

commission appointed under said act was continued from year to year by subsequent acts of Congress. (R., 19.)

* * * * *

At the time of the passage of said act, July 1, 1902, the members of said tribe residing in said Territory were the communal owners under treaties, among other things, of about four and a half million acres of land, with water rights, leases to railroads, pipe lines, telegraph and telephone companies, and other public-service corporations; also of valuable public buildings, schoolhouses, and townsite property, and also of a large sum in the Treasury of the United States, which still remains in the Treasury, and to which other sums have been added and still others are to be added, exceeding $2,000,000.

Proceeding under the authority of said act, the Commission to the Five Civilized Tribes, upon the basis of an allotment of 110 acres of the average allottable lands, as provided by section 11 of said act, fixed the then value of said average allotment at $325.60.

After the allotment to those entitled under the provisions of said act July 1, 1902, upon the basis aforesaid, there yet remain sufficient lands to provide about 3,800 allotments of the present aggregate value of about $2,500,000. None of the funds in the United States Treasury to the credit of the Cherokee Nation have been distributed. (R., 21.)

By section 2, act of April 26, 1906, as amended by the act June 21, 1906 (34 Stat. L., 137 and 341)—making said act applicable

to Cherokees—the time for the completion of the roll so made under the act July 1, 1902, and prior acts, was extended or supplemented by permitting the enrollment of children who were minors living on March 4, 1906, whose parents had theretofore been enrolled as members of the Cherokee tribe or had applications pending therefor at the date of the approval of said act.

Under said acts minor children of enrolled Cherokee parents born after September 1, 1902, and living on March 4, 1906, to the number of 5,610 were enrolled on separate lists as other Cherokee citizens had been under the act of July 1, 1902, and which were, after correction and amendment, approved by the Secretary of the Interior on or before March 4, 1907, as provided by said act of April 26 as amended by the act of June 21, 1906; *and there remain enough unallotted lands and undistributed funds in the Treasury of the United States belonging to said Cherokee Nation to equalize the allotments of all Cherokee citizens whose names are upon the roll last approved by the Secretary of the Interior under said acts of April 26 and June 21, 1906.* (R., 21, 22.)

* * * * *

On September 28, 1905, *the Cherokee national* council, in conformity with section 3, article 6, of the constitution of the Cherokee Nation, *passed an act, which was approved* November 7, 1905, *by the President of the United States*, entitled "An act providing for a commission to represent the Cherokee Nation in the preparation of legislation for the

final settlement of its affairs," the pertinent parts of which were in the words and figures as follows, to wit:

"Whereas under existing laws the tribal government of the Cherokee Nation ceases on the fourth day of March, nineteen hundred and six; and

"Whereas many vital and important questions affecting the educational, financial, and property interests of the Cherokee Nation and its people remain open and unprovided for by existing laws and treaties; and

"Whereas those in whom this vast estate is vested and whose rights are involved, the Cherokee people, ought to be consulted and have a right to be heard in that behalf: Therefore

"*Be it enacted by the national council of the Cherokee Nation:* Section 1. That the principal chief be, and he is hereby, authorized and directed to appoint a commission, consisting of three persons, by and with the consent of the Senate, who shall be authorized to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs and of our relations with the United States of America, except as to all matters now pending in the courts of the United States.

* * * * *

"*Be it further enacted: Sec.* 4. That the principal chief or, in the event of a written statement by him of his inability to attend at any time, the assistant chief is hereby authorized to attend upon said commission as an ex officio member thereof, without compensation

other than the salary already provided by law for such officers, respectively, except said principal chief or assistant chief, as the case may be, who may be actually engaged with said commission, shall receive his actual and necessary personal and traveling expenses while so engaged outside the Cherokee Nation, to be shown by itemized accounts in duplicate, accompanied by vouchers; and a sufficient sum is hereby appropriated, out of the general fund not otherwise appropriated, to pay the same.

"*Be it further enacted:* SEC. 5. It is hereby made the duty of the national attorney of the Cherokee Nation to accompany said commission and advise them upon matters of law, and assist them in the work without additional expense to the Cherokee Nation."

And as provided in said act the following members of the Cherokee commission were appointed: W. W. Hastings, E. L. Cookson, and Fred McDaniel. (R., 23.)

On September 29, 1905, the Cherokee commission, composed of W. W. Hastings, E. L. Cookson, and Fred McDaniel, by a joint resolution of the national council of the Cherokee Nation was instructed as follows:

"*Resolved,* It is the sense of the national council of the Cherokee Nation, representing the Cherokee people, that a final settlement of our affairs should be made:

"First. For the participation of all children born since September first, nineteen hundred and two, and prior to March fourth, nineteen hundred and six, who but for the limitation

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contained in section twenty-five of the act of Congress of July first, nineteen hundred and two, would be entitled to share equally with children born prior thereto, and that said participation should, if possible, be equal in every respect in the lands and moneys as provided by said act of Congress. If this can not be, then a sum of money should be given to each of said children as will equal so far as possible the share which has been given others under said act.

"Second. For the sale of surplus lands, public property, buildings, and grounds upon the very best terms possible, and the distribution of our moneys per capita among those entitled thereto when the same shall have been collected and our obligations satisfied, or provisions made therefor.

"Third. For continuing the primary schools, seminaries, insane asylum, and orphanage at the expense of the Cherokee Nation, until such time as by taxation or otherwise a general school system is established by another government in the Cherokee Nation; that it would be double taxation, unfair and unjust to the Cherokee people, to retain a portion of their funds for the maintenance of schools beyond the time when a general or public school system is provided for all inhabitants of said nation alike.

"*Be it further resolved*, That the commission heretofore authorized by act of the national council are requested to use their best efforts to secure the favorable action of Congress upon the matters referred to in this resolu-

tion." After the commencement of the suit herein, to wit, August 17, 1907, said resolutions were approved by the President of the United States. (R., 24.)

The Cherokee commission, accompanied by W. C. Rogers, principal chief of the Cherokee Nation and ex officio member of said commission, and by Luman F. Parker, jr., national attorney of the Cherokee Nation, came on to Washington on November 21, 1905, and conferred with the representatives of the Interior Department, the Commissioner of Indian Affairs, and the House and Senate Committees on Indian Affairs, and at the request and recommendation of said Cherokee commission, as instructed by the Cherokee national council, section 2 of the act of April 26, 1906 (34 Stat., 137), providing for the enrollment of minor children living on March 4, 1906, born of recognized and enrolled parents in the Cherokee Nation with the same property rights as other recognized and enrolled citizens of the Cherokee Nation, was incorporated into the act of April 26, 1906, and amended by the act of June 21, 1906 (32 Stat., 325). (R., 24.)

Section 2 of amendments to article 1 of the constitution of the Cherokee Nation provides:

"The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same in accordance with the provisions of article twenty of the treaty of nineteenth of July, eighteen hundred and sixty-six, between the United States and the Cherokee Nation."

And said section 20 of the treaty of 19th of July, 1866 (14 Stat., 799), provides as follows:

"Whenever the Cherokee national council shall request it the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them at the expense of the United States." (R., 25.)

By section 63, act July 1, 1902, *supra*, it was provided that "the tribal government of the Cherokee Nation shall not continue longer than March 4, 1906." But by joint resolution of Congress approved March 2, 1906 (34 Stat., 822), it was extended as follows:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law."

And the tribal government of the Cherokee Nation was thereafter continued by section 28 of the act of April 26, 1906 (34 Stat., 137), "until otherwise provided by law," and no other law has been subsequently enacted providing for the dissolution of the tribal government of the Cherokee Nation. The allottable lands and funds remaining after the allotments among those enrolled under the act of July 1, 1902, were allotted and distribution provided for to those enrolled

under said act of April 26, as amended by the act of June 21, 1906. Said allotments are treated by the Interior Department "as tentative allotments," their finality depending upon the construction of said acts of April and June, 1906. (R., 25.)

ARGUMENT.

A.

This case is moot, and there is nothing upon which a judgment of the court can properly operate.

Before discussing the merits of the controversy presented by this appeal, to wit, the power of Congress in 1906 to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, the date previously fixed by Congress for closing the roll of citizens for that nation, by permitting the enrollment of children who were minors living on March 4, 1906, whose parents had theretofore been enrolled as members of the Cherokee tribe or had applications pending therefor at the date of the approval of the act of April 26, 1906, we desire, as we have previously done in the *Brown and Gritts* case, to call attention to an important question concerning the constitutionality of the jurisdictional act itself.

The sole authority for bringing this suit is a certain provision in the jurisdictional act of March 1, 1907 (ch. 2285, 34 Stat., 1015, 1028), an examination of which (R., 22) will clearly show that the jurisdictional act is unconstitutional.

This is so for the reason that the jurisdictional act itself does not authorize this court to make any judgment which this court can properly make in any proceeding. The last paragraph in the jurisdictional act shows the nature of the judgment which the act intended to authorize, to wit, merely a judgment denying the validity of certain acts of Congress. This being the nature of the judgment contemplated by the jurisdictional act itself, the petitioners were not entitled to ask for a judgment of any other sort or description, and Congress has no more power to authorize suits to be brought against the United States for the mere purpose of determining the validity of its acts than it has to submit directly to this court the academic question of whether one or more of its acts are constitutional. It can not do indirectly what it is forbidden by the Constitution to do directly. It is immaterial that Congress might have authorized the suit to be brought against the United States as to the lands involved in this case in ejectment or otherwise. It has authorized no such suit.

B.

Upon the merits, the judgment below dismissing the petition should be affirmed.

Upon the merits of the case the Government will contend:

I. That it is indisputable that prior to the passage of the so-called citizenship act of March 3, 1901, whatever title or interest the Cherokees had in the

unallotted lands and funds of that tribe was in them as a nation and not as individuals, and that said lands and funds were subject to the paramount authority of Congress to distribute them as it saw fit among such persons as it might find entitled thereto by any means which it deemed appropriate, and that therefore it was within the power of Congress, for the purpose of distributing said lands and funds, to revise and supplement the roll of citizens of that nation as often as in its opinion justice required it.

II. That the so-called citizenship act of March 3, 1901, did not affect the paramount authority of Congress to dispose of the tribal lands and funds of the Cherokee Nation to such persons as it might find entitled thereto and to revise and supplement the roll of citizens of that nation as often as in its judgment justice required it.

III. That the Cherokee allotment act of July 1, 1902, whether taken by itself or in connection with the so-called citizenship act of March 3, 1901, did not affect or destroy in any way the power of Congress to dispose of the tribal lands and funds of the Cherokees to such persons as it might find entitled thereto by any appropriate means, and to revise and supplement the roll of citizens of that nation as often as in its opinion justice required it.

Preliminarily it should be observed that if on March 2, 1901, Congress had authority to distribute the unallotted lands and funds of the Cherokee tribe to such persons as it might find entitled thereto, by any

means which it deemed appropriate, and had the power to revise and supplement the roll of citizens of that nation as often as in its opinion justice required it, it had that power when the act of June 21, 1906, was passed, amending section 2 of the act of April 26, 1906, *supra*, unless its authority to do so was destroyed by some act or grant between those dates. The only acts that can be claimed to have had that effect between March 2, 1901, and June 21, 1906, are the so-called citizenship act of March 3, 1901, and the Cherokee allotment act of July 1, 1902. It is not contended that any grant was made, unless it is to be found in the act of July 1, 1902.

I.

It is indisputable that prior to the passage of the so-called citizenship act of March 3, 1901, whatever title or interest the Cherokees had in the unallotted lands and funds of that tribe was in them as a nation and not as individuals, and that said lands and funds were subject to the paramount authority of Congress to distribute them as it saw fit among such persons as it might find entitled thereto by any means which it deemed appropriate, and that therefore it was within the power of Congress, for the purpose of distributing said lands and funds, to revise and supplement the roll of citizens of that nation as often as in its opinion justice required it.

(*a*) Whatever title or interest the Cherokees had in the unallotted lands and funds of that tribe prior to the passage of the so-called citizenship act of March 3, 1901, was in them as a nation, not as individuals. (*Stephens* v. *Cherokee Nation*, 174 U. S., 445, 478, 483,

488; *Cherokee Nation* v. *Hitchcock*, 187 U. S., 294, 305–307. See also *Lone Wolf* v. *Hitchcock*, 187 U. S., 553, 568; *Wallace* v. *Adams*, 204 U. S., 415; *Fleming* v. *McCurtain*, 215 U. S., 56; *Conley* v. *Ballinger*, 216 U. S., 84, 90, 91.)

In *Stephens* v. *Cherokee Nation* (174 U. S., 445, 478, 483, 488) the principal question involved was, "Was the legislation of 1896 and 1897, so far as it authorized the Dawes Commission to determine the citizenship of these tribes constitutional?" This court held that it was constitutional upon the ground as stated in its opinion by Chief Justice Fuller that "the lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms." Moreover, the Chief Justice, in the course of his opinion, referred to the interest of persons claiming to be entitled to citizenship in the Five Civilized Tribes as "the mere expectation of a share in the public lands and moneys of these tribes if hereafter distributed, if the applicants are admitted to citizenship."

In *Cherokee Nation* v. *Hitchcock* (187 U. S., 294, 295, 305) the complainants sought to enjoin the Secretary of the Interior from leasing oil lands held for the benefit of the Cherokee Nation on the ground that the act of June 28, 1898 (30 Stat., 495), was unconstitutional in so far as it attempted to confer authority upon the Secretary of the Interior to make said

leases. The complainants contended that by virtue of the treaties of May 6, 1828 (7 Stat., 331), February 14, 1833 (7 Stat., 414), and December 29, 1835, and of the patent of 1838 based upon said treaties, the Cherokee Nation was vested with the fee-simple title to its tribal lands, with the right to enact and enforce laws for the protection of the lands and for the welfare of the tribe, and that, therefore, the provisions of the act above referred to were unconstitutional. But this court rejected that contention in an opinion by Mr. Justice White, which is in part as follows (p. 305):

> As the acts done and contemplated to be done by the appellee and assailed by the bill of complaint, are presumably not the subject of criticism, in the event that the act of June 28, 1898, was a constitutional and valid exercise of power by Congress, we will now address ourselves to a consideration of that statute.
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> * * * Considering the treaty of 1835 with the Cherokee Nation, under which it is now claimed on behalf of the appellants, that the Cherokees became vested with the sole control over the lands ceded to them, the court observed [in *Stephens* v. *Cherokee Nation*, 174 U. S. 484]:
>
> By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or juris-

diction of any State or Territory. * * * But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits.

* * * * *

The holding that Congress had power to provide a method for determining membership in the five civilized tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe.

Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. *The Cherokee Trust Funds*, 117 U. S. 288, 308.

In *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 568) Mr. Justice White, in referring to the last-named case, said:

The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches and Apaches still existed, and that statute and the statutes supplementary thereto dealt with the disposition of tribal property and purported to give an adequate consideration for the sur-

> plus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation* v. *Hitchcock* (187 U. S., 294), decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

Also in *Wallace* v. *Adams* (204 U. S., 415, 423) Mr. Justice Brewer, in referring to the earlier case of *Stephens* v. *Cherokee Nation* (174 U. S., 445), said:

> This decision established that no such vested right was created by the proceedings of the

Dawes Commission or the judgments of the courts of the Indian Territory on appeal from the findings of the commission as prevented subsequent investigation. The power of Congress over the matter of citizenship in these Indian tribes was plenary, and it could adopt any reasonable means to ascertain who were entitled to its privileges. If the result of one measure was not satisfactory, it could try another.

(*b*) Prior to the passage of the so-called citizenship act of March 3, 1901, Congress had full power over the unallotted lands and funds of the Cherokee Nation, and could distribute them as it saw fit among such persons as it might find entitled thereto by any means it deemed appropriate.

1. Despite the fact that the Indian tribes have some sort of an interest in their unallotted lands, Congress has repeatedly assumed and exercised the power of disposing of those lands without the tribes' consent and against their will. The exercise of that power was sustained in *Cherokee Nation* v. *Hitchcock* (187 U. S., 294, 295, 305), and again in *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 568).

It is true that in the former case the only question necessarily involved in the judgment was the power of Congress to lease unallotted lands of the Cherokee Nation against the will of the tribe. But, of course, no valid distinction can be taken between the power to lease and the power to sell. It is true also that the funds derived from the leasing of said lands were to be used for the benefit of the tribe, but this does

not destroy the fundamental fact that Congress assumed ownership over this land against the will of the tribe, though, of course, for a worthy purpose.

In *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 568) Congress assumed and exercised the power of disposing of the unallotted property of the Comanche, Kiowa, and Apache tribes of Indians contrary to the express provisions of its treaties with them, and it is very doubtful whether it gave the tribes a *quid pro quo* for the property disposed of. Concerning this aspect of the transaction, this court said:

> The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches and Apaches still existed, and that statute and the statutes supplementary thereto dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. * * * If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

(*c*) The right which Indian tribes have in their unallotted land is one which the United States is bound by honor to respect—not by law. The latest decision of the United States Supreme Court on this subject has affirmed what the preceding cases left little doubt

of—to wit, that the United States was bound only in honor to observe the rights which Indians have in their tribal lands.

This is squarely the ground of the decision in *Conley* v. *Ballinger* (216 U. S., 84, 90). In that case the complainant was a descendant of the Wyandotte Indians. The Wyandotte Indians had ceded their land to the United States for subdivision in severalty to the members thereof, except a certain portion, concerning which it was expressly provided in the treaty that it shall be permanently reserved and appropriated for the purpose for which it was then used—to wit, a public burying ground. Numerous members of the complainant's family were buried therein. The Secretary of the Interior was on the point of selling the same. The complainant accordingly brought an action to enjoin the Secretary of the Interior from selling or disturbing the Indian cemetery, urging that she had a legal and vested estate in that cemetery, etc. Upon this state of facts Mr. Justice Holmes said:

> The argument that vested rights were conferred upon individuals by that treaty, stated as strongly as we can state it, would be that, as the tribe was to be dissolved by the treaty, it cannot have been the beneficiary of the agreement for the permanent appropriation of the land in question as a public burying ground, that the language used imported a serious undertaking, and that to give it force as such the United States must be taken to have declared a trust. If a trust was declared, the benefit by it must have been limited to the

members of the disintegrated tribe and their representatives, whether as individuals or as a limited public, and thus it might be possible to work out a right of property in the plaintiff, as a first step towards maintaining her bill.

But we do not pursue the attempt to state the argument on that side because we are of opinion that it is plainly impossible for the plaintiff to prevail. There is no question as to the complete legislative power of the United States over the land of the Wyandottes while it remained in their occupation before their quitclaim to the United States. (*Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565.) When they made that grant they excepted this parcel. Therefore it remained, as the whole of the land had been before, in the ownership of the United States, subject to the recognized use of the Wyandottes. But the right of the Wyandottes was in them only as a tribe or nation. The right excepted was a right of the tribe. The United States maintained and protected the Indian use or occupation against others, but was bound itself only by honor, not by law. This mode of statement sounds technical perhaps, but the principles concerned are not so.

(*d*) If the United States is only bound in honor to respect the interest which the Indian tribe has in its unallotted land, it is clear beyond a doubt that the United States, for the purpose of distributing the unallotted tribal lands among the members of the tribe, may revise and supplement the roll of citizens of that tribe as often as it sees fit.

Moreover, this court has not only established indirectly beyond question that Congress has the power to supplement and revise the roll of citizens of an Indian tribe as often as it sees fit, but it has practically settled the question itself by direct decision.

For in *Stephens* v. *Cherokee Nation, supra,* this court had under consideration the power of Congress, after having provided that the judgments of the lower court should be final as to persons entitled to be enrolled as citizens of the Cherokee Nation, and other members of the Five Civilized Tribes, to provide for a review of those judgments by this court, and the power was upheld.

In *Wallace* v. *Adams* (204 U. S., 415, 423), where this court had under consideration a similar question in regard to the Five Civilized Tribes, Mr. Justice Brewer said concerning the power of Congress over citizenship in Indian tribes that—

> The power of Congress over the matter of citizenship in these Indian tribes was plenary, and it could adopt any reasonable means to ascertain who were entitled to its privileges. If the result of one measure was not satisfactory it could try another. The fact that the first provision was by an inquiry in a territorial court did not exhaust the power of Congress to preclude further investigation.

II.

The so-called citizenship act of March 3, 1901, did not affect the paramount power of Congress to dispose of the tribal lands and funds of the Cherokee Nation to such persons as it might find entitled thereto, and to revise and supplement the roll of citizens of that tribe as often as in its opinion justice required it.

(*a*) The so-called citizenship act of March 3, 1901 (ch. 868, 31 Stat., 1447), amending section 6 of the General Allotment Act of February 8, 1887 (ch. 119, 24 Stat., 388, 391), it seems, was only designed to confer United States citizenship upon those Indians in the Indian Territory who had voluntarily taken up their residence separate and apart from any tribe of Indians, and had adopted the habits of civilized life.

Section 6 and section 8 of the General Allotment Act of February 8, 1887, provides as follows:

> Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under

any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property (24 Stat., 390).

Sec. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, etc. (24 Stat., 390).

The act of March 3, 1901 (31 Stat., 1447), provided that section 6 should be amended by inserting after the words "civilized life" the words "and every Indian in Indian Territory."

The position of the phrase "and every Indian in Indian Territory" in section 6, as amended by the act of March 3, 1901, suggests that the class to which it refers may reasonably be limited by the provision which immediately precedes it and which refers to Indians in the United States who have voluntarily taken up their residence separate and apart from any

tribe of Indians and have adopted the habits of civilized life. Doubtless there was such a class of Indians in the Indian Territory, especially in its rapidly growing towns, who had taken up their residence separate and apart from other tribes and had adopted the habits of civilized life and were in fact more or less ready for citizenship.

The act of March 3, 1901, if limited to such a class will be more in harmony with section 8 of the general allotment act, which it did not expressly repeal, and which, therefore, should be given some effect, unless entirely inconsistent with section 6, as amended by the act of March 3, 1901. Moreover, if the act of March 3, 1901, is thus limited in its scope, it will be in more harmony with the fact that Congress, in the act of May 8, 1906 (ch. 2348, 34 Stat., 182), amended section 6 of the general allotment act, and in that amendment not only completely ignored the act of March 3, 1901, but expressly declared that the section should be inapplicable to any Indians in the Indian Territory.

If that be the scope of the so-called citizenship act, it will scarcely be contended that it was intended to limit or affect the power of Congress over tribal lands and property.

(*b*) But whether the act of March 3, 1901, conferred citizenship upon all members of the Five Civilized Tribes or not, the citizenship conferred by it was of a qualified character, and not intended to alter the fundamental relation existing between the United States and said Indians and their property.

Certainly, Congress may, if it chooses, confer qualified citizenship upon Indians dwelling within the Territory. In other words, Congress may confer upon an Indian many or most of the rights which a United States citizen usually enjoys, without conferring all.

In view of this, the general words in the above section supposed to confer citizenship should be construed in connection with other congressional legislation of about the same date, showing an intention on the part of Congress to retain its peculiar control over the Indians in question.

Congress, at the same session at which it passed the so-called citizenship act of March 3, 1901, also passed an act of the same date in which it recognized the tribal government of the Indians concerned, and assumed the power (through the Secretary of the Interior) to fix the time to close the rolls of citizens entitled to share in the property of the Five Civilized Tribes without the consent of the tribes or any of their members in case no agreement could be reached with the tribes as to the time of closing the rolls (act of March 3, 1901, ch. 832, 31 Stat., 1058, 1077), for in the last-named act it was expressly provided:

> The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for

closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto.

That no act, ordinance, or resolution of the Creek or Cherokee tribes, except resolutions for adjournment, shall be of any validity until approved by the President of the United States. When such acts, ordinances, or resolutions passed by the council of either of said tribes shall be approved by the principal chief thereof, then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same. Said acts, ordinances, or resolutions, when so approved, shall be published in at least two newspapers having a bona fide circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same.

Despite the passage of the so-called citizenship acts Congress continued to deal with the Indians of the Five Civilized Tribes as tribes. (See act of June 30, 1902, ch. 1323, 32 Stat., 500, 504; 32 Stat., 2021; act of July 1, 1902, ch. 1362, 32 Stat., 641; act of July 1, 1902, ch. 1375, 32 Stat., 716.)

Indeed, the Cherokee allotment act of July 1, 1902 32 Stat., 716, 721), itself extended the time previously fixed for closing the roll of citizens of the Cherokee Nation from July 1, 1902, to September 1, 1902, and continued the tribal government.

(*c*) The decisions and judgments of this court confirm the view above expressed, that whatever citizenship was conferred upon the members of the Five Civilized Tribes was of a qualified character, and not intended to alter the fundamental relation existing between the United States and said Indians and their property. (*United States* v. *Celestine*, 215 U. S., 278, 289, 291; *United States* v. *Sutton*, 215 U. S., 291, 292, 295; *United States* v. *Rickert*, 188 U. S., 432, 437. See also *Conley* v. *Ballinger*, 216 U. S., 84, 90.)

At the outset it should be observed that the members of the Five Civilized Tribes did not receive their allotments under the provisions of the general allotment act, and therefore acquired citizenship, if at all, under the second sentence of section 6 of that act. The significance of this fact will immediately appear upon an examination of the latest cases in this court.

In the *Celestine* case this court distinguished between all Indians who received allotments under the general allotment act of February 8, 1887, and who were, by the first sentence of section 6 of that act, expressly declared "to be subject to the laws, both civil and criminal, of the State or Territory in which they reside," and concerning whom it was also expressly provided that "no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law," and the Indians who, under the second sentence of the act, were merely declared to be citizens of the United States and entitled to all the rights, privileges, and immunities of such citizens.

The ground upon which that distinction is based is clearly stated in the opinion by Mr. Justice Brewer, which is in part as follows:

> It will be seen that the first sentence of the latter section, which provides that the allottees shall be "subject to the laws, both civil and criminal, of the State or Territory in which they may reside," applies to allotments and patents made under the authority of that act, whereas the other sentence refers to allotments made under the act of 1887, or under any law or treaty, and in respect to the allottee it is provided only that he "is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens." In other words, so far as the plea is concerned, it is only that Celestine was a citizen of the United States, and entitled to all the rights, privileges and immunities of such citizenship.
>
> * * * * *
>
> Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate, it cannot be said to be

> clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States.
>
> (*United States* v. *Celestine*, 215 U. S., 278, 289–291.)

In *United States* v. *Sutton* (215 U. S., 291, 292, 295) the defendants were indicted in the District Court of the United States for the Eastern District of Washington for introducing liquor into the Indian country, to wit, upon a certain allotment within the limits of the boundary of the Yakima Indian Reservation, in the Eastern District of Washington, in violation of the act of January 30, 1897 (29 Stat., 506), by which it was provided—

> That * * * any person who shall introduce * * * intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished, etc. * * *.

Defendants demurred to the indictment upon the ground that the act was invalid, at least in so far as it related to the land in question, which, together with other land in the reservation, had been allotted sub-

ject to restrictions against alienation to the Indians who, by virtue of said allotment, became citizens of the United States under section 6 of the general allotment act. The lower court sustained the demurrer, squarely basing its judgment upon the invalidity of the act. This court reversed the judgment of the lower court, and fully sustained the validity of the act. The opinion by Mr. Justice Brewer indicates that the judgment was based in part at least upon the broad proposition that even Indian allottees, though citizens of the United States, are nevertheless wards of the United States so long as they hold their land subject to restrictions against alienation. Mr. Justice Brewer's opinion is in part as follows (p. 295):

> The lands allotted were subject to restrictions against alienation, and the title which was conferred by the allotments was subject to defeasance. * * * In this offense neither race or color are significant. The Indians, as wards of the Government, are the beneficiaries, but for their protection the prohibition is against all, white man and Indian alike. Legislation of this nature has been for a long time in force. Fourth sec., chap. 174, Laws 1832, 4 Stat. 564; § 2139, Rev. Stat. If the Yakima Reservation were within the limits of a Territory there would be no question of the validity of the statute under which this indictment was found, but the contention is that the offense charged is of a police nature and that the full police power is lodged in the State, and by it alone can such offenses be punished.

In *United States* v. *Rickert* (188 U. S., 432, 437) this court, in an opinion by Mr. Justice Harlan, recognized that a mere grant of United States citizenship to Indians does not necessarily prevent their being wards of the United States, or, at any rate, that the citizenship conferred by section 6 of the general allotment act is or may be of such a qualified character as to permit Indians receiving citizenship by virtue of said act to continue to be wards of the United States in a condition of pupilage or dependency. For in that case, despite the fact that the Indians in question had become citizens of the United States and had received their allotments, this court, in its opinion by Mr. Justice Harlan, describes their relation to the United States in these words:

> These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of a national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race of which this court has said that "from their very weakness and helplessness, so largely due to the

> course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." *United States* v. *Kagama*, 118 U. S. 375, 384.

Under these decisions, therefore, it would seem clear that the mere grant of citizenship does not necessarily terminate the peculiar relation of the Indians to the United States, and that the extent to which that relationship continues is to be determined in the light of the entire legislation affecting the tribes in question.

The *Heff case* (197 U. S., 488, 499, 502) does not conflict with this view. The Indians there concerned had received their grant under the first sentence of the general allotment act, and had been expressly made subject to the criminal laws of the State within which they dwelt. Moreover, the Indians concerned were Kickapoo Indians, and the judgment of the court was largely based upon the legislation affecting those Indians. Besides, the judgment concerned the subjection of the Indians to the criminal laws of the State. In the course of his opinion Mr. Justice Brewer said concerning the power of Congress to continue or abandon its guardianship of the Indians:

> It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine

> when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end (p. 499).

(*d*) But aside from this, the so-called citizenship act of March 3, 1901, expressly provides that the citizenship conferred shall not impair or affect the right of the Indian receiving it to tribal or other property. The exact words of the act here pertinent are: "Every Indian" (to wit, every Indian to whom the language applied) "is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges, and immunities of such citizens * * * without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

If it did not affect the right of the Indian to the tribal property, how could it affect the power of Congress over that tribal property?

(*e*) Besides, the case of *Conley* v. *Ballinger* (216 U. S., 84, 90) establishes beyond question that no matter in what terms United States citizenship may be conferred upon the members of an Indian tribe, the members of that tribe acquire no interest in the unallotted land of that tribe which the United States is bound by law to respect.

In that case the complainant brought a bill in equity to enjoin the Secretary of the Interior and others from selling or disturbing an Indian cemetery. The bill was demurred to on various grounds. *The bill in substance charged that the complainant was a citizen of the State of Kansas and of the United States, and a descendant of the Wyandotte Indians* dealt with in the treaty of January 31, 1855 (10 Stat., 1159). That by article 1 of that treaty the tribe of the Wyandottes was to be dissolved on the ratification of the treaty and the members made citizens of the United States, with exemption for a limited time of such as should apply to it for exemption. That by article 2 the Wyandotte Nation ceded their land to the United States for subdivision in severalty to the members, "except as follows, viz, the portion now inclosed and used as a public burying ground, shall be permanently reserved and appropriated for that purpose," etc. That the complainant's parents and sister are buried in this burial ground, and she alleges that she has seizin, and a legal estate and vested rights in and to the same. That the defendants are threatening to sell the burying ground, etc., and that the proceeds, after certain deductions, were to be paid to parties to the treaty of 1855, or their representatives, in accordance with the act of Congress of June 21, 1906 (ch. 3504, 34 Stat., 325, 348), and that therefore said act under which the Secretary is intending to act violates the constitutional rights of the complainant and is void. Moreover, an examination of the above-mentioned act shows

that the deductions above referred to were very extensive. Notwithstanding this, the court held that since whatever rights the Wyandottes had in their unallotted lands was in them as a tribe, and since the United States had complete legislative power over the tribal lands of the Wyandottes, and since it was only bound in honor to respect the interest of the tribe therein, the complainant had no such interest in the property as to entitle her to an order restraining the Secretary of the Interior. The grounds upon which this court based its opinion are cogently stated in the opinion by Mr. Justice Holmes, which opinion is in part as follows (pp. 89, 90):

> The argument that vested rights were conferred upon individuals by that treaty, stated as strongly as we can state it, would be that, as the tribe was to be dissolved by the treaty, it cannot have been the beneficiary of the agreement for the permanent appropriation of the land in question as a public burying ground, that the language used imported a serious undertaking, and that to give it force as such the United States must be taken to have declared a trust. If a trust was declared, the benefit by it must have been limited to the members of the disintegrated tribe and their representatives, whether as individuals or as a limited public, and thus it might be possible to work out a right of property in the plaintiff, as a first step towards maintaining her bill.
>
> But we do not pursue the attempt to state the argument on that side because we are of

opinion that it is plainly impossible for the plaintiff to prevail. There is no question as to the complete legislative power of the United States over the land of the Wyandottes while it remained in their occupation before their quitclaim to the United States. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565. When they made that grant they excepted this parcel. Therefore it remained, as the whole of the land had been before, in the ownership of the United States, subject to the recognized use of the Wyandottes. But the right of the Wyandottes was in them only as a tribe or nation. The right excepted was a right of the title. The United States maintained and protected the Indian use or occupation against others, but was bound itself only by honor, not by law. This mode of statement sounds technical perhaps, but the principles concerned are not so.

III.

Nor did the Cherokee allotment act of July 1, 1902, whether taken by itself or in connection with the so-called citizenship act of March 3, 1901, affect the paramount power of Congress to dispose of the tribal lands and funds to such persons as it might find entitled thereto by any appropriate means, and to revise and supplement the roll of citizens of that nation as often as in its opinion justice required it.

(*a*) In the Cherokee allotment act of July 1, 1902 (ch. 1375, 32 Stat., 716), Congress assumed and exercised authority over the tribal lands and funds of the Cherokees inconsistent with the supposition that it

conceived of itself, as having lost by the so-called citizenship act, its paramount authority over said tribal property. It provided for the allotment of specific quantities of land, for the extension of the time for closing the roll, for a particular method by which the tribe might ratify the act, and for the continuance of the tribal government until March 4, 1906. It also placed restrictions upon the sale and leasing of that land after it had been received by the allottee.

(*b*) The act of July 1, 1902, if, when duly ratified as therein provided, was an agreement with any party or parties, it was an agreement with the Cherokee Nation as a tribe, and not the members thereof as individuals.

1. The ratification provided for by the act was to be by the tribe as such. The principal chief was to issue the proclamation for an election to determine whether the act would be accepted or rejected, and he, as principal chief, was to appoint such officers and make such other provisions as might be necessary for holding such election, and the votes cast at that election were to be certified, as required by the Cherokee law, and counted by the Cherokee National Council in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief were jointly to transmit the certificate of the votes cast and the proclamation of the result of the election to the President of the United States.

2. The fact that at the date of the act whatever title or interest the Cherokees had in the unallotted

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lands and funds of that tribe was in them as a nation and not as undividuals militates against the view that Congress intended to enter into any agreement with the members of the nation as individuals.

3. The continuance of the tribal government by the act itself confirms the view that whatever agreement was made was made with the tribe itself.

4. Moreover, it has always been the custom of Congress to deal with the tribes themselves, and it is not to be supposed that Congress varied from its custom in the act of July 1, 1902.

5. Besides, the act of July 1, 1902, was not an agreement or treaty with any party, but a mere act of Congress. (*Cherokee Intermarriage Cases*, 203 U. S., 76, 93.)

(*c*) The agreement, if any, being with the Cherokee Nation as a tribe, the promises therein contained, if any, were to it as a tribe. This is clearly implied by the case of *Conley* v. *Ballinger* (216 U. S., 84, 89–91), where the court held, among other things, that despite the fact that the treaty contemplated the dissolution of the tribe in question it was more reasonable to suppose that the promise therein contained as to the use of certain property was addressed only to the tribe and rested for its fulfillment on the good faith of the United States, "a good faith that would not be broken by a change believed by Congress to be for the welfare of the Indians." *Fleming* v. *McCurtain* (215 U. S., 56) is to the same effect, where it was held that an ambiguous word capable of being construed as either applicable to the tribe itself or

to the members thereof as individuals should, in the treaty with the tribe, be construed as applicable to the tribe.

Moreover, the fact that the statute is in reality merely a statute, despite its ratification by the tribe, does not affect the proposition that its promises, if any, should be construed as made to the tribe, not to the individual members thereof, for Congress provided for the ratification of the statute by the tribe, and the modern method of dealing with the Indian tribes by statute is but a substitute for the old method of dealing with them by treaty. Therefore, since whatever promises are contained in the act of July 1, 1902, are to the tribe, if it contained a direct promise to the effect that all such lands and funds remaining over after the distribution specially provided for in the act had been made should be distributed in equal shares among the enrolled citizens of the Cherokee tribe as of the date of September 1, 1902, it would be a promise to the tribe and one which the United States was merely bound in honor to respect. (*Conley* v. *Ballinger*, 216 U. S., 84, 90, 91.) Likewise, the provision in the act that "no person whose name does not appear upon the roll prepared as herein provided shall be entitled in any manner to participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act," if a promise to any one was a promise to the tribe, and therefore Congress is only bound in honor to keep it.

(*d*) The act only specifically provided for the allotment of land equal in value to 110 acres of the average allottable lands of the Cherokee Nation, and expressly provided that it should be unlawful, ninety days after the ratification of the act, for any member of the Cherokee tribe to inclose or hold possession of in any manner, by himself or through another, directly or indirectly, more lands in value than that of 110 acres of average allottable land of the Cherokee Nation, either for himself or for his wife, or for each of his minor children. The failure of Congress to provide means for distributing the lands and funds of the Cherokee tribe in equal parts among all members of that tribe suggests that Congress deliberately intended only to provide for the allotment of a portion of the tribal lands and to retain the balance for such emergencies as might arise.

(*e*) The contention, therefore, that the act amounts to a grant is utterly untenable, for not even the provision as to the allotment of the 110 acres was in any sense a grant before actual allotment. Certainly vague promises by implication as to future participation in the unallotted lands and undistributed funds of the Cherokee Nation are not to be construed as grants.

(*f*) If, as has been shown, the act of July 1, 1902, itself does not grant an undivided interest in the unallotted lands of the Cherokee Nation to anyone, it will scarcely be contended that the act, when considered in connection with the so-called citizenship act, grants such an interest.

(*g*) The act contains no reference, direct or indirect, to United States citizenship, nor do its provisions show any intention on the part of Congress to abandon its peculiar guardianship over the citizens of the Cherokee Nation, at least as to their tribal property.

CONCLUSION.

In conclusion, it is submitted that if, as has been shown, the act of July 1, 1902, did not grant the individual members of the Five Civilized Tribes any vested interest in such land as should remain unallotted after the allotment specially provided for had been made, that Congress was at liberty to supplement the roll of citizens of the Cherokee Nation by providing for the enrollment of children born after September 1, 1902, living on March 4, 1906, despite the fact, if such be the fact, that the members of the Cherokee Nation have been citizens of the United States in every sense of the word since the so-called citizenship act of March 3, 1901, and despite the fact, if such be the fact, that that citizenship completely destroyed the peculiar relationship of those Indians to the United States.

Further, if, as has already been shown, neither the so-called citizenship nor the act of July 1, 1902, destroyed the peculiar relationship of the Cherokee Indians to the United States, the alleged fact that the act of 1902 granted an undivided interest in all the lands and funds of the Cherokee Nation to citizens of said nation, as of the date of September 1,

1902, is immaterial, for the property of Indians, so long as they are wards of the United States, especially where it has not been actually distributed to them, is subject to the paramount authority of the United States to redivide so as to secure a more equitable distribution thereof.

The judgment of the Court of Claims should be affirmed.

WADE H. ELLIS,
HENRY E. COLTON,
Special Assistants to the Attorney-General.

NOVEMBER, 1910.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 331.

WILLIAM BROWN AND LEVI B. GRITTS, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER CHEROKEE CITIZENS HAVING LIKE INTEREST IN THE PROPERTY ALLOTTED UNDER THE ACT OF JULY 1, 1902, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 20, 1909.

(21,830.)

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I. *Original Petition.*

Filed March 16, 1907.

In the Court of Claims.

No. 29987.

WILLIAM BROWN and LEVI B. GRITTS, on Their Own Behalf and on Behalf of All Other Cherokee Citizens Having Like Interest in the Property Allotted under the Act of July 1, 1902,

vs.

THE UNITED STATES.

To the Honorable the Chief Justice and the Associate Justices of the Court of Claims:

Your petitioners, William Brown and Levi B. Gritts, respectfully state and show unto your Honors that—

Under and by virtue of the treaty of New Echota, made on the 29th day of December, 1835, between the Cherokee Indians and the United States, the lands comprising the Cherokee domain were given and granted to the Cherokees in fee simple and the grant thereof confirmed by a patent from the United States, bearing date December 31, 1838, and again confirmed by the treaty of Washington, between the same parties, concluded on the 6th day of August, 1846. Up to the passage of the act of July 1, 1902, hereinafter referred to, these lands were held by the Cherokee people as communal owners thereof; and the communal property on the date last men-

2 tioned, embraced in addition to about four and one-half million acres of land, valuable public buildings, including school houses, asylums, council houses, and other townsite property, also valuable leases to railroads, pipe lines, telegraph and telephone companies, and other corporations; also water rights of great value; also about three million dollars in money then in the Treasury of the United States, to which fund large sums have since been, and others still are to be, added.

By the Constitution of the Cherokee Nation, adopted September 6, 1839, it was provided, in Article one, Section 2 thereof, that "the lands of the Cherokee Nation shall remain common property," and by the first amendment to Article one of said Constitution, in Section 2 thereof, which amendment was adopted November 26, 1866, it was provided that "The lands of the Cherokee Nation shall remain common property until the National Council shall request the survey and allotment of the same, in accordance with the provisions of Article 20th of the Treaty of the 19th day of July, 1866, between the United States and the Cherokee Nation." Article 20 of said Treaty is as follows:

"Art. 20. Whenever the Cherokee National Council shall request it, the Secretary of the Interior shall cause the country reserved for

the Cherokees to be surveyed and allotted among them, at the expense of the United States."

By Act of the Cherokee Council, at its Session of 1901, a formal request for the division and allotment of said lands was made, and, in pursuance of said request, the allotment Act of July 1, 1902, was passed and submitted to the Cherokee people, and ratified and agreed to by them as herein shown.

II.

Petitioners and all others on whose behalf this suit is brought are citizens of the United States and of the Cherokee Nation,
3 resident in the Indian Territory, are full-blood Indians and enrolled as Cherokee citizens for allotment, and bring this suit in their own right and on behalf of all other persons having like interest in the property allotted under the said act of July 1, 1902, entitled "An Act to Provide for the Allotment of the Lands of the Cherokee Nation, for the Disposition of the Townsites Therein, and for Other Purposes" (32 Stat. L., 716).

III.

The act of Congress referred to in the foregoing paragraph, approved July 1, 1902, contains the following provisions affecting the petitioners and the Cherokee tribe of which they were and are members.

SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

4 SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, That the allotment thus to be made shall be selected by

a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

SEC. 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands.

This act containing these provisions was duly submitted, as provided by the terms of the act, to the Cherokee people, who, by a popular vote, as was also therein provided, ratified and agreed to the same on August 7, 1902; and the act thus ratified and agreed to, was proclaimed by the acting chairman of the Commission to the Five Civilized Tribes and by the Principal Chief of the Cherokee Nation, on August 12, 1902, in the following proclamation, to-wit:

"Whereas, an Act of Congress, entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of townsites therein, and for other purposes," approved July 1, 1902, provides:

"The principal chief shall, within ten days after the passage of this act by Congress, make public proclamation that the same shall be voted upon at a special election to be held for the purpose within thirty days thereafter, on a certain date therein named, and he shall appoint such officers and make such other provisions as may be necessary for holding such election. The votes cast at such election shall be forthwith duly certified as required by the Cherokee Law, and the votes shall be counted by the Cherokee National Council, if then in session, if not in session the principal chief shall convene

an extraordinary session for that purpose, in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief shall jointly make certificate thereof and make proclamation of the results, and transmit the same to the President of the United States."

6 "And whereas, said principal chief did, within ten days after the passage of said Act by Congress, make public proclamation that the same should be voted upon at a special election to be held on the 7th day of August, 1902, in the Cherokee Nation, Indian Territory:

"And whereas, said special election was held on the 7th day of August, 1902, in said Nation:

"And whereas, the said Cherokee National Council convened in extraordinary session for the said purpose, and in the presence of a member of the Commission to the Five Civilized Tribes, did, on the 12th day of August, 1902, count the votes cast at said election.

"And whereas, the votes cast at said election were canvassed by the Cherokee National Council and the votes cast at said election show that the said Act was ratified by a majority of nineteen hundred and sixty-four votes:

"Now, therefore, we Tams Bixby, a member of the Commission to the Five Civilized Tribes, and Thomas M. Buffington, principal chief of the Cherokee Nation, do hereby certify and proclaim that the said Act of Congress, entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of townsites therein, and for other purposes," approved July 1, 1902, was by popular vote, at a special election held on the 7th day of August, 1902, ratified by the legal voters of the Cherokee Nation by a majority of nineteen hundred and sixty-four votes:

"Done at Tahlequah, Cherokee Nation, Indian Territory, on the 12th day of August, 1902."

(Signed) TAMS BIXBY,
Member of the Commission to the Five Civilized Tribes.

(Signed) T. M. BUFFINGTON,
Principal Chief of the Cherokee Nation.

7 Under the provisions of this act, there were allotted to your petitioners, certain tracts of land as their homesteads, and there were also set apart and allotted to them at the same time, in accordance with the provisions of the act, certain other tracts or bodies of lands in addition to the homesteads known as "surplus allotments."

IV.

All due and necessary legal formalities, including the issuance of allotment certificates vesting the absolute title in your petitioners in the said homesteads and in the said surplus allotments, were complied with prior to March 11, 1904; so that your petitioners, together with all other persons on whose behalf this suit is brought, were, each, on and before the 11th day of March, 1904, vested with a good and indefeasible title in fee simple to the lands so allotted to them, subject only to the conditions set out in the said act of July 1, 1902.

V.

Your petitioner, William Brown, is an adult full-blood Indian, and an heir at law of Charles Brown, deceased, being his father, who was himself a citizen of the Cherokee tribe, and died subsequent to the first day of September, 1902, and to whom, prior to his death, an allotment had been made under the act of July 1, 1902. By Section 20 of the said act of July 1, 1902, it was provided that such an allotment should descend to the heirs of the allottee "according to the laws of descent and distribution as provided in Chapter 49 of Mansfield's Digest of the Statutes of Arkansas."

By said Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, it is provided as follows:

8 "When any person shall die, having title to any real estate of inheritance, or personal estate not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

1. To children or their descendants in equal parts.

2. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants in equal parts." (Section 2522, p. 575.)

The said Charles Brown, at the time of his death, was a minor of tender years, without children or descendants, and was intestate. His said estate, therefore, descended to your petitioner William Brown, as his sole heir at law.

VI.

By the said act of July 1, 1902, and the said proceedings thereunder, your petitioners William Brown and Levi B. Gritts, and all other persons on whose behalf they bring this suit, became vested with the fee simple title to the lands selected by them respectively for allotment, and particularly with the right, which immediately vested, to lease all their said allotments without restriction for all purposes, including rights of way for pipe lines and railroads and for other public or private enterprises except as restricted by the terms of said Act; for a term of one year for grazing purposes, and for a period of five years for agricultural purposes, without the approval of the Secretary of the Interior, or other restriction of any kind, and with the right after five years from the date of the ratification of the act, namely August 7, 1902, to alien their said lands except those allotted as homesteads.

And under the laws of descent and distribution in force in the Indian Territory, as hereinbefore set out, and applicable to your petitioner William Brown, he became, by reason of the descent cast

9 on him by the death of his son, said Charles Brown, the owner of the said lands selected by the said Charles Brown, and with the right to encumber, lease or alienate the same after August 7, 1907, as any other citizens of the United States, without the consent or interposition of the Secretary of the Interior, or any other officer of the United States.

VII.

But by the act of Congress approved March 11, 1904 (Pub. 45), entitled, "An act authorizing the Secretary of the Interior to grant rights of way for pipe lines through Indian lands," it is provided that the Secretary of the Interior may grant rights of way for the construction, operation and maintenance of pipe lines, for the conveyance of oil and gas, through any lands which have been allotted in severalty to any individual Indian, under any law or treaty, but which have not been conveyed to the allottee, with full power of alienation upon certain terms; and by the same act it is provided that where such lines are not subject to State or Territorial taxation, the revenues arising from such grants shall be paid to the Secretary of the Interior for the use and benefit of the Indians.

And under the authority of this act, the Secretary of the Interior has granted rights of way across the lands of a large number of said allottees among those in whose behalf this suit is brought, and has collected the revenues arising therefrom, and placed the same, not to the credit of the allottees respectively, but to the credit of the general tribal fund; so that moneys payable to allottees for rights of way through their respective allotments are held and are to be enjoyed, and participated in, by all allottees of the Cherokee Nation.

In said act of March 11, 1904, it is further provided that the Secretary of the Interior, at the expiration of the first twenty years, may extend the right to maintain any pipe line constructed under this act for an additional period of twenty years; so that for forty years moneys to be realized from rights of way through the lands of individual allottees may be diverted from the owners of the particular allotments to all the 36,000 allottees of the Cherokee Nation.

Said act of March 11, 1904, provides:

That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided*, That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line com-

pany: *Provided further,* That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements can not be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe-line company shall be permitted to lay its lines under said railroad. The compen-
11 sation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and care: *Provided,* That the rights herein granted shall not extend beyond a period of twenty years; *Provided further,* That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper.

SEC. 2. The right to alter, amend, or repeal this act is expressly reserved.

VIII.

By an act of Congress entitled "An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory and for Other Purposes" (— Stat. L., —), which
12 was approved by the President of the United States, April 26, 1906, and on that day became effective, it was provided:

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the experiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior; *Provided, however,* That such full-blood Indians or any of said tribes may lease any lands other than homesteads for more than one year under such rules and

regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations; *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

13 SEC. 20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval; *Provided,* That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition and filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

IX.

In accordance with the said act approved April 26, 1906, the Secretary of the Interior has prepared and promulgated certain regulations (here to the court shown) entitled "Regulations of July 7,

1906," governing the leasing and sale of lands allotted to or inherited by full-blood Indians of the Five Civilized Tribes for the
14 purpose of carrying into effect the provisions of said sections 19, 20 and 22 of the said act of Congress.

X.

Your petitioners charge, as they are advised and believe, that the right to these allotments as specified, and the right to lease their lands without the supervision of the Secretary of the Interior, and the right to sell inherited lands without the assent or supervision of the Secretary of the Interior, and all other rights hereinbefore described, are vested rights of property duly established and complete in your petitioners, and those on whose behalf they bring this suit, as individuals, which could not be impaired by any subsequent acts of Congress; and therefore that said Act of March 11, 1904, and the said Act of April 26, 1906, and any and all other acts attempting to extend the time in which petitioners might not encumber or alienate their said lands, and might not lease their said lands or any of them, and might not grant any rights of way to pipe lines or other public service corporations, and might not receive the revenues arising from such leases or rights of way, and attempting to provide another method for the disposition of the interests of your petitioner, William Brown, and other persons similarly interested, in the said lands inherited by him or them, accomplishes in each instance, a taking of the property of your petitioners and the other persons on whose behalf they bring this suit, in violation of that provision of the Constitution of the United States, that: "No person shall be deprived of life, liberty or property without due process of law;" and the same are in all such particulars void and of no effect.

XI.

The said lands allotted to your petitioners, and those on whose behalf they bring this suit, and those lands inherited by
15 your petitioner, William Brown, as well as lands so inherited by other full-blood citizens of the Cherokee Nation, on whose behalf also, this suit is brought, are all suitable for both grazing and agricultural purposes; but by reason of said unconstitutional statutes, and by reason of the said regulations made in pursuance thereof by the Secretary of the Interior, your petitioners are unable to contract advantageously for the lease of said lands, or to negotiate for the granting of any easements or rights of way, to railroads, pipe lines, telephone or telegraph companies, or other public service corporations, or to deal with their said lands and said rights, as, being the owners in fee simple of the said lands, and citizens of the United States, they are entitled to deal therewith.

XII.

On the 3rd day of January, 1907, your petitioner, William Brown, filed his bill in the Supreme Court of the District of Columbia in which the foregoing allegations substantially were made. He alleged

also in his said bill that the Secretary of the Interior and the Commissioner of Indian Affairs were about to put into force and effect the said provisions of the said Act of April 26, 1906.

And he now alleges that the Secretary of the Interior has put into force and effect the provisions of the said Act of March 11, 1904, and that the same are now in effect. So that the revenues derived from rights of way through and over allotments of your petitioners and those on whose behalf this suit is brought, are paid and to be paid into the general tribal fund instead of being paid in each case to the respective owners of the lands through or over which such lines are laid or constructed.

In the said bill filed in the Supreme Court of the District of Columbia, your petitioner, William Brown, prayed the issuance of a writ of injunction against the Secretary of the Interior and
16 the Commissioner of Indian Affairs, the prayer of said bill being as follows:

In consideration of the premises, plaintiff prays that process of subpœna issue to the said defendants, Ethan A. Hitchcock and Francis E. Leupp, requiring them, and each of them, to appear and answer fully the exigencies of this bill, and to that end that all necessary process issue and all proper orders be had; that a preliminary injunction issue to said defendants, and to each of them, for rule to show cause why a perpetual injunction should not be granted enjoining them, and each of them, from carrying into effect the said regulations promulgated by the said defendants and from taking any action whatever regarding the said premises of the plaintiff in the pursuance of the said unconstitutional and void act of April 26, 1906; that by the decree of this honorable court the said act of April 26, 1906, be declared, in the particulars mentioned, or in all particulars, to be violative of and repugnant to the constitutional provision cited and therefore to be void and of no effect; and, finally, if mistaken in this, his prayer for relief, that he may have such other, further, and general relief as from the allegations of this bill seems fit and proper to this honorable court.

But before a hearing on the application for the writ of injunction could be had, a bill was introduced in Congress providing the reference of this suit to this Honorable Court. Your petitioners desiring the judgment of this court, and seeking the speedy disposition of the litigation which would be so accomplished, and the Department of the Interior being likewise disposed, it was stipulated in said action in the said Supreme Court of the District of Columbia, that it should be continued, and remain pending, until Congress should determine whether a bill to refer the said cause to this court was to be passed.

XIII.

By an item on the Indian Appropriation Bill of March 1,
17 1907 (Public No. 154), entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and eight," it was provided:

That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the Act of July first, nineteen hundred and two, entitled "An Act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any Acts of Congress passed since the said Act of July first, nineteen hundred and two, in so far as said Acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said Act of July first, nineteen hundred and two.

And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine and adjudicate each of said suits.

The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.

18 Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of the said Acts, authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said Act of July first, nineteen hundred and two.

XIV.

Your petitioners charge that they are the identical persons named in the said jurisdictional act as William Brown and Levi B. Gritts, that under the authority of said act they have the right to bring this suit for and on behalf of themselves and of all Cherokee citizens having like vested property rights, under the said act of July 1, 1902.

Wherefore, the premises considered, your petitioners pray:

First. That they have the judgment and decree of this Honorable Court declaring that your petitioners and all other persons having like interests with them, became vested as individuals under the provisions of the act of July 1, 1902, with the right to lease their lands without the approval of the Secretary of the Interior, with the right to receive the revenues arising from rights of way granted through their

respective allotments, with the right to dispose of their inherited lands as other citizens of the United States under the provisions of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, with the right to alien their said lands or otherwise encumber the same (except their homesteads), within five years from the date of the ratification of the said act of July 1, 1902, and with all other rights of
19 citizens of the United States as to their vested interests, modified only by the conditions prescribed in the said act of July 1, 1902.

Second. That they have the further judgment and decree of this Honorable Court declaring the said Acts of March 11, 1904, and April 26, 1906, in the particulars mentioned in the foregoing bill, to be violative of and repugnant to the constitutional provision cited, and therefore to be void and of no effect.

Third. That they have the further judgment and decree of this Honorable Court that any and all acts of Congress passed since the said act of July 1, 1902, which in any wise attempt to restrict your petitioners and others having like interests, on whose behalf they bring this suit, in their property rights, beyond the restrictions contained in said act, be declared also, violative of the said constitutional provision, inoperative and void; and finally, if mistaken in this their prayer for relief, that they have such other, further, and general relief as the allegations of this petition may demonstrate to be fit and proper to this Honorable Court.

WILLIAM BROWN,
By WM. H. ROBESON,
His Attorney.

(Signed) LEVI B. GRITTS.

WM. H. ROBESON,
DANIEL B. HENDERSON,
JOHN J. HEMPHILL,
FRANK J. BOUDINOT,
Attorneys for Petitioners.

20 DISTRICT OF COLUMBIA, *ss:*

This day personally appeared before me, Levi B. Gritts, and being first duly sworn deposes and says: I am one of the petitioners in the foregoing petition; I have carefully read the same; the statements therein made are true to the best of my knowledge, information and belief.

(Signed) LEVI B. GRITTS.

Subscribed and sworn to before me this 14th day of March, 1907.

CRAYCE E. WILTBERGER,
[SEAL.] *Notary Public.*

My commission expires February 18th, 1911.

21 II. *Amendments to Original Petition.*

Filed March 26, 1908.

In the Court of Claims.

No. 29987.

WILLIAM BROWN and LEVI B. GRITTS on Their Own Behalf and on Behalf of all other Cherokee Citizens Having Like Interest in the Property Allotted under the Act of July 1, 1902,

v.

THE UNITED STATES.

Amendments to Original Petition.

Come now the petitioners, by leave of the court first had and obtained, and present to the court the following amendments to their original petition, the averments of which they now charge to be true.

To be inserted as XI (*a*):

The act of April 26, 1906, which, in section 19, makes all lands upon which restrictions are removed subject to taxation is in violation of the special privilege conferred in section 13 of the allotment act of July 1, 1902, exempting homestead allotments from taxation as long as they should be held by the allottees. This exemption from taxation was and is a valuable property right which
22 Congress had not the power to destroy; and the said provision of said act of April 26, 1906, is likewise in violation of the due process clause of the Constitution.

To be inserted as XI (*b*):

By the act of March 1, 1907 (34 Stat. L., 1025), Congress provided appropriations to carry into effect the provisions as to the leasing and sale by the Secretary of the Interior, under the rules and regulations prepared by him, of the lands of allottees in the following words:

"For clerical work and labor connected with the leasing of Creek and Cherokee lands, for mineral and other purposes, and the leasing of lands of full-blood Indians, under the act of April 26, 1906, thirty thousand dollars; for clerical work and labor connected with the sale of inherited and other lands, Five Civilized Tribes, thirty thousand dollars; in all, sixty thousand dollars: *Provided*, That the sums so expended shall be reimbursable out of the proceeds of such land sales, and leases, and shall be equitably apportioned by the Secretary of the Interior from the moneys collected from such sales and leases."

For as much as the act of April 26, 1906, vesting the Secretary of the Interior with the power to lease or sell said allotments is in violation of the Constitutional provision that private property shall
23 not be taken without due process of law, this provision appropriating said sum of sixty thousand dollars is likewise violative of the same provision, and the Secretary of the Interior is

without authority to charge any sum against any allottee on account of the expenses of such unauthorized leasing or sale.

WILLIAM BROWN,
LEVI B. GRITTS,
By WM. H. ROBESON, *Attorney.*

WM. H. ROBESON,
DANIEL B. HENDERSON,
JOHN J. HEMPHILL,
FRANK J. BOUDINOT,
Attorneys for Petitioners.

DISTRICT OF COLUMBIA, *ss:*

This day personally appeared before me William H. Robeson, who deposes and says under oath, I am one of the attorneys for petitioners. The allegations of the foregoing amendments are true as I verily believe.

WILLIAM H. ROBESON.

Subscribed and sworn to before me this March 26th 1908.
[SEAL.] MARTHA M. BECK,
Notary Public, District of Columbia.

24 III. *Traverse.*

Filed November 24, 1908.

In the Court of Claims of the United States, December Term, A. D. 1908.

No. 29987.

WILLIAM BROWN and LEVI GRITTS
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

25 IV. *Intervening Petition of the Cherokee Nation.*

Filed by Leave of Court May 20, 1908.

Intervening Petition of the Cherokee Nation.

To the Honorable Chief Justice and Associate Justices of the Court of Claims of the United States:

The Cherokee Nation by its principal chief, William C. Rogers, represented by its attorney in fact, William W. Hastings, respectfully shows to this court:

1. As the representative and having in its charge the interests of the Cherokee people entitled to participate in the distribution of the estate belonging to them, it is directly interested in this cause.

2. The Cherokee Nation of Indians is and at all times has been a body politic and recognized as such by the United States.

3. That under and by virtue of the provisions of certain acts of Congress and of the treaties between the United States and the Cherokee Nation of Indians, and the patent of the United States to the Cherokee Nation issued on the 31st day of December, 1838, as supplemented and interpreted by the treaty between the same parties on August 17, 1846, the people of the Cherokee Nation of Indians became the owners of the lands embraced within the limits of the Cherokee Nation, formerly Indian Territory, now Oklahoma, and are possessed of and now own all of said lands that have not been allotted to individual allottees.

4. That said Cherokee Nation as a body politic possessed and under the provisions of the treaties aforesaid was granted the right of local self-government with full authority to make and carry into effect all such laws as it might deem necessary for the Govern-
26 ment and protection of persons and property within its jurisdiction, belonging to its own people or such persons who might be associated or connected with them.

5. In the exercise of this governmental power the people of the Cherokee Nation ordained and established a written constitution and system or code of laws.

6. That by an act of Congress approved March 3, 1893 (27 Stat. L., 645), a Commission, hereafter known as the Commission to the Five Civilized Tribes, was appointed to negotiate agreements with the Five Civilized Tribes, including the Cherokee Nation, for the allotment of the lands in severalty of the Cherokee Nation, and the authority of the Commission appointed under said act was continued from year to year by acts of Congress.

7. On June 10, 1896, Congress by an act (29 Stat. L., 321) conferred the additional authority upon the Commission referred to in the sixth paragraph hereof to hear and determine the applications of all persons for admission to citizenship in the Cherokee Nation with the right of appeal to both the applicant and the Cherokee Nation to the United States court in the Indian Territory, now Oklahoma, and by the act of July 1, 1898 (30 Stat. L., 591), it was provided that an appeal might be taken by either party to the Supreme Court of the United States.

8. By an act approved June 28, 1898 (30 Stat. L., 495), Congress authorized and directed the Commission to the Five Civilized Tribes, with the approval of the Secretary of the Interior, to make a final roll of all persons entitled to be enrolled as citizens of the Cherokee Nation, with instructions in section 21 of said act as to how said roll should be made; and said Commission was further instructed by the act of May 31, 1900 (31 Stat. L., 221), not to receive, consider, or make any record of the application of any person whomsoever who had not been a recognized citizen of the nation and duly and lawfully enrolled and admitted as such.

27 9. On May 11, 1900, the Commission to the Five Civilized Tribes began making the roll of citizens of the Cherokee Nation under the act of Congress approved June 28, 1898 (30 Stat. L., 495), and was engaged in the making of said roll when the acts of May 31, 1900 (31 Stat. L., 221); March 3, 1901 (31 Stat. L., 1073); July 1, 1902 (32 Stat. L., 716); April 26, 1906 (34 Stat. L., 137), and June 21, 1906 (34 Stat. L., 324), were passed, and said roll was completed on March 4, 1907, containing the names of 41,798 enrolled citizens of the Cherokee Nation of whom 6,600 are full-blood Cherokee Indians.

10. That the Commission to the Five Civilized Tribes began the allotment of the lands of the Cherokee Nation to such citizens whose enrollments had been approved on the first Monday of January, 1903, as provided by the act of Congress approved July 1, 1902 (32 Stat. L., 716), and said Commission to the Five Civilized Tribes and its successor, the Commissioner to the Five Civilized Tribes, has continued said allotment to those citizens whose enrollment was from time to time finally approved by the Secretary of the Interior under said act and subsequent acts of Congress, and is now so engaged in the allotment of said land, the work not having been completed.

11. That section- 13, 14, 15 and 63 of said act of July 1, 1902 (32 Stat. L., 716) are as follows:

SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

28 SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

SEC. 15. All lands allotted to the members of said tribe, except such lands as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

SEC. 63. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

12. That the tribal existence of the Cherokee Nation was extended by joint resolution of the Congress of the United States approved March 2, 1906, as follows:

That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law.

And the tribal government of the Cherokee Nation was also continued by section 28 of the act of April 26, 1906 (34 Stat. L., 137), until otherwise provided by law, and no other law has been subsequently enacted providing for the dissolution of the tribal government of the Cherokee Nation.

13. That Congress by sections 19, 20 and 22 of an act approved April 26, 1906 (34 Stat. L., 137) extended the period within which full-blood Cherokee Indians could not alienate their allotted lands to twenty-five years and provided for the supervision by the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands as follows:

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

SEC. 20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other then homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval; *Provided,* That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conform-

ity to the law applicable to recording instruments now in force in said Indian Territory.

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the lands of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

14. That in accordance with section 28 of the act of April 26, 1906 (34 Stat. L., 137), W. C. Rogers, the duly elected, recognized, and acting principal chief of the Cherokee Nation has employed William W. Hastings as attorney for the Cherokee Nation by contract, which contract was approved by the President of the United States, as provided in said section 28, on February 3, 1908, and expires March 4, 1909, and among other things said contract provides that the said William W. Hastings shall represent the Cherokee Nation in all cases in which it is interested before the Court of Claims, when the interests of the Cherokee Nation require it, or when directed by the principal chief.

31 15. That the Cherokee Nation is directly interested in protecting its own citizens, particularly the less educated and more dependent class, the full-blood citizens, and the Cherokee Nation desires the constitutionality of the provisions of the acts complained of in the petition filed herein enacted for the protection of the Cherokee citizens, sustained.

16. That the petitioners herein do not represent the Cherokee Nation or any of the enrolled citizens thereof other than themselves, and are without authority to appear for or to represent any of them.

Wherefore your petitioner prays the court that the Cherokee Nation may be allowed to intervene in said case and be made party defendant for the reasons hereinabove assigned.

WILLIAM W. HASTINGS,
Attorney in Fact for the Cherokee Nation.

DISTRICT OF COLUMBIA, *ss:*

Before me, the subscriber, a notary public in and for the District of Columbia, personally appeared William W. Hastings, and made oath in due form of law that the matters and things contained in the foregoing petition are true as herein set forth, to the best of his knowledge and belief.

Witness my hand and notarial seal this 14th day of May, 1908.

[SEAL.] LEONA E. KIDWELL,
Notary Public.

32 V. *Objection of Petitioners to Appearance of Cherokee Nation.*

Filed Nov. 18, 1908.

Objection is made by the petitioners in this case, to the appearance of the Cherokee Nation, as sought to be effected by its intervening petition, for the following reasons, to-wit:

1. The act provides that the United States alone shall be made a party defendant to the suit.

2. No complaint whatever is made by the petitioners against the Cherokee Nation, and no recovery sought against it.

3. Whatever judgment may be rendered by this court, can not affect the Cherokee Nation.

4. The case involves only the validity of certain enactments of Congress.

5. There is no such body as the Cherokee Nation and was not at the time of the filing of the petition.

WM. H. ROBESON.
DAN'L B. HENDERSON.
JOHN J. HEMPHILL.

33 VI. *Argument and Submission of Case.*

On November 24, 1908, the argument for the claimants was begun by Mr. John J. Hemphill.

On November 25, 1908, Mr. George M. Anderson was heard for the defendants and Mr. William W. Hastings was heard for the Cherokee Nation. Mr. Daniel B. Henderson and Mr. William H. Robeson replied for the claimants and the case was submitted.

34 VII. *Findings of Fact and Conclusions of Law, and Opinion of the Court and Dissenting Opinion of Howry, J.*

Filed February 8, 1909.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

In pursuance of the provisions of the treaties of February 14, 1833 (7 Stat., 414), and December 29, 1835 (7 Stat., 478), between the United States and the Cherokee Nation, and in accordance with the provisions of the act of May 28, 1830 (4 Stat., 411), the President of the United States, on December 31, 1838, executed a patent conveying to the Cherokee Nation 14,374,135.14 acres of land, subject to

certain conditions, among which "to the condition provided by the act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above-cited third article, and which condition is that the lands hereby granted shall revert to the United States if the Cherokee Nation becomes extinct or abandons the same," of which there remained undivided, as the property of the Cherokee Nation, on July 1, 1902, 4,420,000 acres of land.

II.

On May 11, 1900, the Commission to the Five Civilized Tribes began the making of the roll of citizens of the Cherokee Nation under the act of Congress approved June 28, 1898 (30 Stat., 495), and was engaged in the making of said roll when the acts of May 31, 1900 (31 Stat., 221), March 3, 1901 (31 Stat., 1073), July 1, 1902 (32 Stat., 716), April 26, 1906 (34 Stat., 137), and June 21, 1906 (34 Stat., 321), were passed; and said roll was completed on March 4, 1907, containing the names of 41,798 enrolled citizens of the Cherokee Nation, of whom 8,698 are Cherokee citizens of the full-blood.

35 III.

The act approved July 1, 1902 (32 Stat., 716), entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," was submitted, in accordance with its terms, to a vote of the Cherokee people, by whom it was ratified on August 7, 1902, and the ratification thereof was, on August 12, 1902, certified and proclaimed by the chairman of the Five Civilized Tribes and the principal chief of the Cherokee Nation.

The first amendment to article 1 of the constitution of the Cherokee Nation, adopted November 26, 1866, provided that "the lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same in accordance with the provisions of article 20 of the treaty of July 19, 1866, between the United States and the Cherokee Nation," which provides:

"Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the land reserved for the Cherokee Nation to be surveyed and allotted among them at the expense of the United States." (14 Stat. L., 799.)

IV.

The Commission to the Five Civilized Tribes began the allotment of the lands of the Cherokee Nation, aggregating about 4,420,000 acres, to citizens thereof, whose enrollment had been approved on the first Monday of January, 1903, as provided by the act of Congress approved July 1, 1902, *supra*, and said Commission and its successor, the Commissioner to the Five Civilized Tribes, have continued the making of said allotments to those citizens whose enrollment has from time to time been finally approved by the Secretary of the

Interior, under said act and subsequent acts of Congress, and is now still engaged in the allotment of said lands.

V.

In pursuance of the said act of July 1, 1902, allotment certificates and patents for homesteads and surplus lands have been and are still being issued to lawfully enrolled Cherokee citizens in accordance with the following forms:

Department of the Interior,
Commission to the Five Civilized Tribes.

Certificate of Allotment.

Roll number.

Cherokee roll.	Freedmen roll.

Certificate
No. ——.

CHEROKEE LAND OFFICE,
——, I. T., —— —, 190–.

This certifies that —— —— has this day filed his selection of the following-described land, viz:.....
.....
containing — acres, more or less, as the case may be, according to the United States survey thereof. Total appraised value of land described in this certificate $——.

36

COMMISSION TO THE FIVE CIVILIZED TRIBES,
—— ——,
Commissioner in Charge.

This certificate is not transferable.

Department of the Interior, Commission to the Five Civilized Tribes.

Certificate of Homestead Allotment.

Roll number.

Cherokee roll.	Freedmen roll.

Certificate
No. —.

CHEROKEE LAND OFFICE,
——, I. T., —— —, 190–.

This certifies that —— —— has this day selected the following-described land as a homestead, viz:.....
.....
containing —— acres, more or less, as the case may be, according

to the United States survey thereof. Total appraised value of land described in this certificate $——.

COMMISSION TO THE FIVE CIVILIZED TRIBES,

—— ——, *Commissioner in Charge.*

This certificate is not transferable.

Date of certificate, —— —, —.

Homestead deed ——, Cherokee Citizen Roll No. —.

The Cherokee Nation, Indian Territory.

To all whom these presents shall come, greeting:

Whereas by the act of Congress, approved July 1, 1902 (32 Stat., 716), ratified by the Cherokee Nation August 7, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Cherokee Nation, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation; and

Whereas it was provided by the said act of Congress that each member of said tribe shall, at the time of the selection of his allotment, designate or have selected and designated for him from his allotment, land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, as a homestead, for which separate certificate shall issue; and

Whereas the said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of —— ——, a citizen of said tribe, as a homestead:

Now, therefore, I, the undersigned, the principal chief of the Cherokee Nation, by virtue of the power and authority vested
37 in me by the aforesaid act of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey, unto the said —— ——, all right, title, and interest of the Cherokee Nation, and of all other citizens of said nation, in and to the following-described land, viz:.....

.....

acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said act of Congress pertaining to allotted homesteads.

In witness whereof I, the principal chief of the Cherokee Nation, have hereunto set my hand and caused the great seal of said nation to be affixed this — day of ——, —. —— ——,

Principal Chief of the Cherokee Nation.

Department of the Interior.

Approved —— —, 190–.

[Seal of the Cherokee Nation.]

—— ——,

Acting Secretary.

By —— ——, *Clerk.*

Date of certificate, —— —, —.

Allotment deed ——, Cherokee Citizen Roll No. —.

The Cherokee Nation, Indian Territory.

To all to whom these presents shall come, Greeting:

Whereas by the act of Congress approved July 1, 1902 (32 Stat., 716), ratified by the Cherokee Nation August 7, 1902, it is provided that there shall be allotted by the Commission to the Five Civilized Tribes, to each citizen of the Cherokee Tribe, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation; and,

Whereas it is provided by said act of Congress that each citizen shall designate or have designated and selected for him, at the time of his selection of allotment, out of his allotment, as a homestead, land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, for which he shall receive a separate certificate; and,

Whereas the said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of —— ——, a citizen of said tribe, as an allotment, exclusive of land equal in value to forty acres of the average allottable lands of the Cherokee Nation, selected as a homestead as aforesaid:

Now, therefore, I, the undersigned principal chief of the Cherokee Nation, by virtue of the power and authority vested in me by aforesaid act of Congress of the United States, have granted and conveyed, and by these presents do grant and convey, unto the said —— —— all right, title, and interest of the Cherokee Nation and of all other citizens of said nation in and to the following-described land, viz:

.....

38 acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to all the provisions of said act of Congress.

In witness whereof I, the principal chief of the Cherokee Nation, have hereunto set my hand and caused the great seal of said nation to be affixed this — day of —— —, —.

——— ———,
Principal Chief of the Cherokee Nation.

Department of the Interior.

Approved —— —, 190–.

[Seal of the Cherokee Nation.]

——— ———,
Acting Secretary,
By —— ——, *Clerk.*

VI.

Under the provisions of the said act, there were allotted to the petitioners, William Brown and Levi B. Gritts, and to those other persons on whose behalf this suit is brought, certain tracts of lands as their homesteads, respectively, and there were also set apart and allotted to each of them, in accordance with the provisions of said

act, certain other tracts or bodies of land designated as "surplus allotments."

VII.

By act of Congress approved March 11, 1904 (33 Stat. L., 65), entitled "An act authorizing the Secretary of the Interior to grant rights of way for pipe lines through Indian lands," it is provided that the Secretary of the Interior may grant rights of way for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with the power of alienation upon certain terms; and by the same act it is provided that where such lands are not subject to state or territorial taxation, the revenues arising from such grants shall be paid to the Secretary of the Interior for the use and benefit of the Indians; and under the authority of this act the Secretary of the Interior has granted rights of way across the lands of a large number of said allottees, in whose behalf this suit is brought, and has collected the revenues arising therefrom and has paid the same over to the individual allottees upon whose lands said rights of way have been located.

In said act of March 11, 1904, it is further provided that the Secretary of the Interior, at the expiration of the first twenty years, may extend the right to maintain any pipe lines constructed under the authority of said act for an additional period of twenty years.

VIII.

By an act of Congress entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes" (34 Stat., 137), which was
39 approved by the President of the United States April 26, 1906, and on that day became effective, it was provided:

"SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of

restriction, where patents thereafter issue, shall not be deemed or held invalid solel, because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

"SEC. 20. That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper court: Provided further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

"SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inher-ted from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

IX.

In accordance with the said act approved April 26, 1906, the Secretary of the Interior has prepared and promulgated certain regulations entitled "Regulations of July 7, 1906," and also other regulations of June 11, 1907, governing the leasing and sale of lands allotted to, or inherited by, full-blood Indians of the Five Civilized Tribes, for the purpose of carrying into effect the provisions of said sections 19, 20, and 22 of said act of Congress, which regulations are by reference made a part hereof.

X.

By a provision in the Indian appropriation bill of March 1, 1907 (34 Stat. L., 1015, 1028), entitled "An act making appropriation for the current and contingent expenses of the Indian Department for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June 30, 1908," it was provided—

"That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled 'An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' and David Muskrat and J. Henry Dick, on their own behalf and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

"And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal by either party to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

"The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts and by the Attorney-General, who is hereby charged with the defense of said suits.

"Upon the rendition of final judgment by the Court of Claims or the Supreme Court of the United States, denying the validity of any portion of the said acts authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two."

41 XI.

The petitioners, William Brown and Levi B. Gritts, are the identical persons named in the jurisdictional act approved March 1, 1907 (34 Stat., 1015-1028), and are enrolled as full-blood citizens of the Cherokee Nation, and have received allotment certificates and patents for their respective shares of Cherokee tribal lands under the act

of July 1, 1902, *supra*. The restrictions upon the alienation of a part of the surplus lands of the petitioner Brown have been removed, and upon all of the surplus lands of the petitioner Gritts.

The petitioner, William Brown, is an adult full-blood Cherokee Indian, the father of Charles Brown, deceased, who was his only son, a minor without children or descendants, who died intestate on September 1, 1904, leaving no mother, brothers, or full sisters, and but one half-sister, Josie Elkhair, surviving him—he and the said Josie Elkhair having the same mother. Prior to the death of said Charles Brown he had received an allotment of land in the Cherokee Nation under the act of July 1, 1902.

By section 20 of the said act of July 1, 1902, it was provided that such an allotment should descend to the heirs of the allottee "according to the laws of descent and distribution as provided in chapter 49 of Mansfield's Digest of the Statutes of Arkansas." By said chapter 49 of Mansfield's Digest of the Statutes of Arkansas it is provided as follows:

"When any person shall die, having title to any real estate of inheritance or personal estate not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

"1. To children or their descendants, in equal parts.

"2. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters or their descendants, in equal parts." (Sec. 2522, p. 575.)

Section 2531, chapter 49, of Mansfield's Digest of the Statutes of Arkansas, edition of 1884, in force in the Indian Territory at the date of the death of the said Charles Brown, provides:

"In cases where the intestate shall die without descendants, if the estate shall come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided."

The said Charles Brown at the time of his death was a minor of tender years, without children or descendants, and intestate.

XII.

The petitioners, William Brown and Levi B. Gritts, have never been granted authority to represent the Cherokee Nation or any of the enrolled citizens thereof except as provided by the terms of the jurisdictional act aforesaid.

42

XIII.

The said lands allotted to petitioners, William Brown and Levi B. Gritts, and to a large number of those on whose behalf this suit is

brought, and those lands inherited by the petitioner William Brown, as well as lands so inherited by other full-blood citizens of the Cherokee Nation on whose behalf also this suit is brought, are to a large extent suitable for both grazing and agricultural purposes.

XIV.

The full-blood enrolled citizens of the Cherokee Nation, to whom lands in the Cherokee Nation have been and are still being allotted, are in the main in favor of the extension of the period of restriction upon alienation within which they can not alienate, sell, dispose of, or encumber in any manner their lands; and they are also in favor of the supervsion of the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands as provided in the acts complained of in the original petition of the claimants filed in this cause, as they are uneducated and unable to speak the English language and have never before owned alienable lands, and without governmental supervision are incompetent to represent and protect themselves in the sale or leasing of their allotted lands.

XV.

On December 21, 1906, the petitioner, William Brown, filed in the Supreme Court of the District of Columbia a bill attacking the validity of the act of April 26, 1906, and seeking to have the same declared to be in violation of the Constitution of the United States; but, before hearing on the application for a writ of injunction, Congress passed the act of March 1, 1907, conferring jurisdiction upon this court to hear and determine this suit.

XVI.

Prior to the passage of the act of April 26, 1906, *supra*, many of the full-blooded citizens of the Cherokee Nation had been induced by designing persons to execute deeds of their allotted lands, and contracts to sell, and to otherwise encumber their allotments in violation of the provisions of the act of July 1, 1902, *supra*, at grossly inadequate compensation to said Indians for the execution of said deeds, contracts, and mortgages having been made contingent upon the delivery of valid titles to the purchaser or mortgagee as the case might be. Since the passage of the act of April 26, 1906, *supra*, large numbers of such deeds, contracts to sell, and mortgages of their allotted lands, in violation of said last-mentioned act, are being filed almost daily in the offices of the recorders of deeds of the counties of Oklahoma, where the said lands are situated; and suits have been brought by the United States embracing 25,338 transactions in the United States courts of the State of Oklahoma to cancel said deeds, contracts, and mortgages upon the ground that they are a cloud upon the titles of such Indians to their allotments.

43 XVII.

By the act of March 1, 1907 (34 Stat. L., 1025), provision was made for charging the lands of full-blood Cherokee allottees in the

sum of $30,000 to pay for the clerical work connected with the leasing of lands of such allotments for mineral and other purposes, and the sum of $30,000 to pay for the clerical work and labor connected with the sale of inherited lands of the Five Civilized Tribes in the Indian Territory.

The sum of $30,000 appropriated by the act, "for clerical work and labor connected with the leasing of Creek and Cherokee lands, for mineral and other purposes, and the leasing of lands of full-blood Indians," was reimbursed as provided by said act, and the regulations issued by the Secretary of the Interior in pursuance of the provisions of said act were revoked prior to the filing of the amendment to the claimants' original petition, March 26, 1908, complaining of said provision, and the provision for reimbursement for said expenses "for clerical work and labor connected with the leasing of Creek and Cherokee lands," etc., was omitted from the item in the Indian appropriation act approved April 30, 1908 (35 Stat., ——).

Conclusions of Law.

Upon the foregoing findings of fact the court decides, as conclusions of law, that:

(1) The joint resolution of Congress approved March 2, 1906 (34 Stat., 822), and section 28 of the act of Congress approved April 26, 1906 (34 Stat., 137), operated to continue the tribal government of the Cherokee Nation for all purposes under existing laws until otherwise provided by law, and was a recognition by the political department of the Government of the United States of the existence of that tribal government.

(2) The enrolled citizens of the Cherokee Nation, being still members of the tribe and recognized by the political department of the Government of the United States, were not emancipated from the control of Congress by the act of March 3, 1901 (31 Stat., 1447), conferring upon them citizenship of the United States.

(3) The extension of the period of restrictions upon alienation to twenty-five years within which no full-blood Cherokee citizen can alienate, sell, dispose of, or encumber in any manner his allotted lands unless his restrictions shall be removed by Congress, or lease or sell his inherited lands without the approval of the Secretary of the Interior, is a valid exercise of the authority of Congress.

(4) The acts of March 11, 1904 (33 Stat. L., 65), and April 26, 1906 (34 Stat. L., 137), in so far as they or either of them "attempt to increase or extend the restrictions upon alienation, incumbrance, or the right to lease the allotments of lands of Cherokee citizens," beyond those authorized by the act of July 1, 1902, are valid statutes.

(5) The issuance of allotment certificates and allotment deeds, in conformity with the provisions of said act of July 1, 1902, to individual Cherokee allottees, including the petitioners, vested in them the fee-simple title to the lands described in said allotment certificates and allotment deeds respectively.

44 (6) The petitioner William Brown is the sole heir-at-law of Charles Brown, deceased, under the provisions of chapter

49 of Mansfield's Digest of the Statutes of Arkansas, and at the time of the death of the said Charles Brown became the owner of the allotment made to the said Charles Brown.

(7) The petition is dismissed and judgment ordered for the defendants.

Opinion.

PEELLE, *Ch. J.*, delivered the opinion of the court:

By the special act set out in finding X jurisdiction is conferred upon the court, with the right of appeal, "to determine the validity of any acts of Congress passed" since the act July 1, 1902 (32 Stat. L., 716), "in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens" enrolled as of September 1, 1902, in accordance with said act July 1, 1902.

The importance of the case can hardly be overstated. It involves the power of Congress, after allotments have been made in severalty under the provisions of said act, with certain restrictions against alienation, encumbrance, and leasing, to increase or enlarge such restrictions by subsequent legislation. The decision, the defendants assert, "will affect not only the allotments of 8,689 Cherokee full bloods directly concerned in this case, but indirectly all of the Five Civilized Tribes of Oklahoma, numbering perhaps 30,000 persons."

The character of the title to the lands held by the Cherokees was considered by the court in the recent case of Muskrat and Dick (44 C. Cls., —), holding, on the authorities there cited, that whatever of title was conveyed by the United States by the patent of December 31, 1838, "was conveyed to the Cherokees as a nation," no title being vested in severalty in any of them (Cherokee Trust Fund, 117 U. S., 288; Cherokee Nation v. Hitchcock, 187 U. S., 294, 307). The title so conveyed was subject to the conditions that the tribe should not become extinct or abandon possession of the lands, and as neither of the conditions named had happened when the allotment act of July 1, 1902, was passed, the title remained in the nation for the benefit of all its members, and will continue to be so held until divested by the United States.

The act of July 1, 1902, ratified by the Cherokees by popular vote, imposed for their protection the restrictions set forth, as follows:

"SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

"SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

"SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

"SEC. 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said commission to make said selection and designation.

"SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

"SEC. 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

"SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands."

By the act of March 11, 1904 (33 Stat. L., pt. 1, p. 65), the Secretary of the Interior was "authorized and empowered" to grant a right of way for the construction of pipe lines for the conveyance of oil and gas through any lands held by an Indian tribe or nation in

the Indian Territory, and through lands allotted in severalty
46 to individual Indians, "which have not been conveyed to the allottee with full power of alienation," for a period not exceeding twenty years, with the right of renewal for a like period at the expiration thereof, upon such terms as the Secretary of the Interior may determine. As the lands allotted under the act July 1, 1902, have not "been conveyed with full power of alienation," as shown by the sections of the act quoted, the authority of the Secretary of the Interior to grant such rights of way extend and apply to the lands so allotted and conveyed.

While the act — March 11, 1904, does not fall strictly within the letter of the jurisdictional act "to increase or extend the restrictions upon alienation, incumbrance, or the right to lease the allotments of lands of Cherokee citizens," imposed by the act July 1, 1902, it was passed since that date; and if it does not "attempt to increase or extend the restrictions" so imposed, it will necessarily operate against alienation as well as against the freedom of the allottees to incumber or lease such allotments, and, therefore, we will consider it in connection with the subsequent acts to which objection is made.

Thereafter the act of April 26, 1906 (34 Stat. L., 137), sections 19, 20, and 22, provides:

"SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: Provided, however, That such full-blood Indians of any of said Tribes may lease any lands other than homesteads for more than one year, under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions be, and the same is hereby, declared void: Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

"SEC. 20. That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee,
47 Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper court: Provided further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

"SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

For the purpose of carrying into effect the provisions of said sections the Secretary of the Interior, in July, 1906, and thereafter, prepared and promulgated necessary regulations whereby the sale and leasing of lands allotted to or inherited by full-blood Indians of the Five Civilized Tribes are to be governed.

By an amended petition filed March 26, 1908, long after the time fixed by the jurisdictional act for the commencement of suit, the claimants attack a provision in said jurisdictional act (March 1, 1907, p. 1025), charging the lands allotted to full-blood Cherokees with clerical expenses connected with the leasing of such allotments for mineral and other purposes; but as that provision clearly is not covered by the language of the jurisdictional act respecting the extension of the restrictions upon alienation, incumbrance, or the right to lease allotments, we will not consider it further than to say that the money so used was reimbursed before the filing of the amended petition herein, and it has since been omitted in the appropriation act of April 30, 1908 (35 Stat. L., —); and besides it can hardly be said that Congress intended the court to consider the validity of the provision in the same act that contained the jurisdictional clause.

The question as to the validity of the act of April 26, 1906, as amended by the act of June 21, 1906—to apply to the Cherokees—so far as said act attempts "to increase the number of persons entitled to share" in the common property beyond those enrolled for

allotment as of September 1, 1902, under the act of July 1, 1902, was considered in the Muskrat case, supra. The decision on the authorities there cited was based on the continued existence, by various acts of Congress, of the tribal government of the Cherokee Nation; and inasmuch as the act under which allotments were made in that case provided for the continued existence of the tribal government until March 4, 1906, the court held that Congress had the power to extend the time for the completion of the roll so as to embrace all Cherokee citizens living on that date.

48 As the common property was held by the nation for the mutual benefit of the communal owners, their rights in the common property continued so long as the tribal government existed. The tribal government having been continued beyond the time fixed in the act of July 1, 1902, for allotment, those born after September 1, 1902, were denied the right to share in the allotments under that act though living on March 4, 1906. But the moment they were born their communal rights attached to the unallotted lands. True, those to whom allotments had been made continued communal owners in the same lands, their rights thereto not having been relinquished under the act of July 1, 1902. But Congress having seen fit to continue the tribal government to March 4, 1906, by the same act which authorized the allotments, the allottees were bound to take notice thereof; and they, having under that act acquired their rights to the exclusion of those born after September 1, 1902, are in no condition to complain if their communal interest in such unallotted lands and undistributed funds be taken to equalize the allotments to all those so born who were living on March 4, 1906. Only by this method could Congress have provided for the equalization of allotments to March 4, 1906, and we held that the power was lodged in Congress to make it.

In the present case the question is somewhat different from that, as it involves the power of Congress, after imposing restrictions against alienation and leasing of allotments to all alike for a fixed time, to extend such restrictions as against the lands allotted to a segregated class designated as "full-blood Indians" of the Cherokee and other civilized tribes.

In the act of July 1, 1902, section 13, the allottee is prohibited from alienating his homestead, taken as part of his allotment, during his lifetime, not exceeding twenty-one years, during which time the allotment is nontaxable and free from debts contracted while so held by the owner.

By section 14 it is provided that the lands allotted to citizens shall not be incumbered or sold to satisfy any debt or obligation, or be alienated by the allottee of his heirs, before the expiration of five years from the date of the ratification of the act. And by section 15 it is provided that all lands allotted to members of the tribe, except the lands selected for homesteads, "shall be alienable in five years after issuance of patent." Section 16 gives the commission authority to select allotments and designate homesteads for those who for any reason fail to do so.

By the act of April 26, 1906, sections 19 and 20, it is provided, in

substance, that no full-blood Indian of the Five Civilized Tribes "shall have power to alienate, sell, dispose of, or incumber in any manner any of the lands allotted to him for a period of twenty-five years" from and after the passage of the act, unless such restrictions be removed by Congress prior to the expiration of such period. And section 19 declares that "for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior."

Right is given by section 20 to full-blood Indians to lease, in writing, with the approval of the Secretary of the Interior, their allotments, other than their homesteads, for one year; and if for
49 a longer period, the lease to be recorded in conformity with the laws of the Indian Territory.

Provision is made in section 22 for the sale by adult heirs and guardians of minors of deceased allottees who have received patents.

However, it is unnecessary here to notice other provisions of the sections of the act further than to say that the provisions look to the protection of the Indians, especially the full-bloods, who are less civilized and therefore less able to protect and care for themselves.

Furthermore, if the act extending restrictions against alienation and incumbrance of allotments by full-blood Indians for the period of twenty-five years be held valid, then the validity of the other minor provisions of the act will follow.

The contention of the claimants is that as Congress by the act of March 3, 1901 (31 Stat. L., 1447), declared Cherokee citizens to be citizens of the United States, they thereby severed the relation of guardian and ward; and having severed that relation it is not within the power of Congress to reestablish it; and having by the act of July 1, 1902, acquired—subject to certain restrictions—vested rights in the lands set apart to them Congress thereby emancipated such allottees and their private property from congressional control.

If that contention be true and the claimants and those they represent are *sui juris*, the invalidity of the acts extending restrictions must be conceded, as the general theory of the law is that every citizen of the United States, not under some disability imposed by law, is invested with authority to manage and dispose of his own property, to enter into contracts, and to do and perform such acts as pertain to his personal rights, obligations, interests, and duties.

Another principle of law equally well established is that every one who is competent and *sui juris* to act for himself may employ another to act for him; and if not competent and *sui juris* to act for himself, the Government, through its proper channel, may act for him to the end that he be protected in his rights of person and property.

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government." (Lone Wolf v. Hitchcock, 187 U. S., 553, 565, quoted in the case of Matter of Heff, 197

U. S., 488, 498.) But this question is too well established to require further comment.

Referring to the acts of Congress continuing the tribal government, and the effect of those acts, the court, in the case of Muskrat et al. v. United States (44 C. Cls., —), said:

"Section 63 of the act of July 1, 1902, provides that 'the tribal government of the Cherokee Nation shall not continue longer than March 4, 1906;' but by joint resolution of Congress, March 2, 1906 (34 Stat. L., 822), the tribal existence and present tribal governments of the Cherokee Nation and other civilized tribes in the Indian Territory were 'continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law.' And thereafter, by section 28 of the act of April 26, 1906, the tribal existence and present tribal government of said nation was, with certain restrictions therein specified, 'continued in full force and effect for all purposes authorized by law until otherwise provided by law.'

50 "Therefore, in considering the questions involved, we shall assume the validity of those provisions continuing the tribal existence and tribal government of the Cherokee Nation in force and effect until all property of said nation shall have been distributed among the individual members thereof."

On the authority of those acts the court must assume the continued existence of the tribal government of the Cherokees. Nor will we analyze the acts to ascertain of how much authority the tribal government has been shorn. We are aware of no authority which makes power in the tribe to act essential to constitute tribal relations, though some power may be presumed.

As the United States is the self-constituted guardian of the Indians, with plenary authority over their tribal relation, it is for Congress and Congress alone to determine when that relation shall cease. In other words, when Congress by their legislation have declared that the tribal government of the Cherokees shall "continue in full force and effect for all purposes authorized by law until otherwise provided by law," the courts can not enter into the quantum of authority remaining in the tribe, and by construction defeat the will and purpose of Congress.

In the case of Matter of Heff, *supra* (p. 499) the court said:

"Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the

judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end."

On the authority of that case the claimants contend that by virtue of the act of March 3, 1901, declaring Cherokee citizens to be citizens of the United States, Congress terminated the relation of guardian and ward, thereby investing them with full power and authority as other citizens of the United States over the control of their property.

In the case of Cherokee Nation v. Hitchcock, *supra* (at p. 309), being an action to enjoin the Secretary of the Interior, under section 13 of the act of June 28, 1898 (30 Stat. L., 495), from leasing oil lands held for the benefit of said nation, the court said: "There is no question involved in this case as to the taking of property; the authority which it proposes to exercise by virtue of the act of 1898 has relation merely to the control and development of tribal property, which still remains subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

51 If citizenship may be conferred upon Indians while in tribal relations without affecting the administrative control of their tribal property, it follows that their communal rights in such property are not thereby removed from the control of Congress.

In the case of National Bank of Commerce v. Anderson (147 Fed. Rep., 87, 90), respecting the sale of allotted lands upon which there was a restriction against alienation for twenty-five years, the court said: "The granting of citizenship does not affect the character of the title to land allotted to the Indian, nor is the restriction against alienation inconsistent with citizenship;" citing, among others, United States v. Rickert (188 U. S., 432) and United States v. Thurston County (143 Fed. Rep., 287).

The purpose of Congress to retain control of the property and lands of the Cherokee Indians is shown by the enabling act of June 16, 1906 (34 Stat. L., 267), admitting Oklahoma into the Union as a State, section 1 of which provides:

"That nothing contained in said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

Clause 3 of section 3 provides:

"That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the

United States. That land belonging to citizens of the United States residing without the limits of said State shall never be taxed at a higher rate than the land belonging to residents thereof; that no taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use."

Under that act Oklahoma was admitted into the Union, November 16, 1907.

It has been held that "the authority of the State can not be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes" (Dick v. United States, 208 U. S., 340, 353). It has also been held that the United States, in conformity with treaty provisions, may for police purposes retain control over lands in a State the Indian title to which has been extinguished and the lands allotted in severalty, notwithstanding the citizenship of the allottees, and that twenty-five years was not an unreasonable period. (Dick v. United States, *supra.*)

Though the enabling act was passed June 16, 1906, Oklahoma was not admitted into the Union as a State until after the acts of 1904 and 1906 were in force. Besides, the right of the Government respecting the person and property of the Indians was reserved in the enabling act "to make any law or regulation respecting such
52 Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed." Hence, no question of conflict between national and state authorities is involved.

Does this authority of the United States extend to lands allotted in severalty to Indians declared to be citizens of the United States while tribal relations continue?

The full-blood Indians to whom allotments have been made are in the main in favor of the restrictions placed upon their lands by the acts in question, and are in favor of the supervision of the Secretary of the Interior over the leasing and sale of their lands, as set forth in Finding XIV. And this, doubtless, for the reason, as set forth in Finding XVI, that prior to the passage of the act of April 26, 1906, many of the full-blood Indians had been induced by designing persons to sell and convey their lands, or contract to sell or to otherwise incumber the same, at grossly inadequate compensation and in violation of the act of July 1, 1902.

The same finding also recites that since the passage of the act of April 26, 1906, large numbers of such deeds, mortgages, and contracts to sell and incumber their respective allotments are being filed daily in the office of the recorder of deeds in the counties where such lands are situate, all in violation of said act of 1906. In other words, these were the conditions respecting the lands allotted to the full-blood Indians when the act of 1906 was passed for their protection.

But, independent of the findings, the court will take judicial notice of the Indians as wards of the nation and their consequent dependence upon the Government as their guardian. The native Cherokees were even opposed to the allotment act of 1902, preferring to continue their tribal relations and the communal ownership of the

lands. This is shown in the Cherokee Intermarried Whites Case (203 U. S., 76, 93), where the court, after designating said allotment act as an act of Congress and not a treaty, said: "It is a singular commentary on the situation that the majority of the native Cherokees voted against its acceptance, which was carried by the vote of the whites."

The full-bloods or native Cherokees are uneducated and unable to speak the English language, and without the protection of the Government it is manifest that they are liable to lose the lands allotted to them. The restrictions placed upon their lands against alienation, incumbrance, and leasing will be removed when the Government is satisfied that it can withdraw its protection without detriment to the interests of the owners. This is evidenced by the act of May 27, 1908 (35 Stat. L., ——), whereby the acts of 1902 and 1906 have been materially changed and modified, as therein shown.

By section 19 of the act of 1906 the lands upon which the restrictions were imposed are free from taxation so long as held by the original allottees, and this is a benefit and protection and not a detriment to the owner.

As was said by the court in the case of Lone Wolf v. Hitchcock (187 U. S., 553, 567), quoting from the case of United States v. Kagama (118 U. S., 375, 383), "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, be-
53 cause the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce it- laws on all the tribes." So here the exercise of the power of government is necessary to the protection of the less civilized, the weak and the unlettered full-blood Indians, against designing men, as well as for the safety of those with whom they dwell. This does not involve a taking of the property of the full bloods, as the acts in controversy simply subject their allotments to administrative control for their sole benefit until they are *sui juris* and competent to protect themselves.

It would be strange indeed if the Government in dealing with its wards, desiring to aid them in taking an advance step in civilization by conferring upon them citizenship and the right to hold real estate in severalty, could not invoke its own power while tribal relation exists to protect them in the rights thus conferred. We think the power to do so rests in Congress, notwithstanding the citizenship conferred upon the Indians and the allotment of their lands in severalty.

The acts in question seek the protection of those most in need thereof, and they wisely consent to the administrative shield. If they consent, though by the jurisdictional act some of their number are designated to maintain this action, who will be harmed or what principle of law will be violated in holding the acts valid while tribal relations are recognized by Congress?

In respect to the act of March 11, 1904, *supra*, giving the Secre-

tary of the Interior authority to grant, for a period of twenty years, with the right of renewal, rights of way for the construction of pipe lines through lands allotted in severalty to individual Indians "which have not been conveyed to the allottee with full power of alienation," we must hold, so far as we are authorized to consider this act, that in view of the recognized and continued existence of the tribal government the authority therefor, as an administrative act, rests with Congress. Whether, if tribal relations should cease, the act would operate to limit the power of the Secretary within the period of disability imposed by the allotment act of July 1, 1902, or whether the authority of the Secretary to grant such rights of way through lands of individual allottees when such allottees shall have acquired full power of alienation, we deem it unnecessary now to decide. So far as the authority of the Secretary to grant such rights of way through tribal lands, we think there can be no question in view of the authority of Congress to control tribal property.

These acts of 1904 and 1906, and any other acts looking to the protection of the title of these full-blood Indians to the lands allotted to them, are analogous to the protection afforded by the States to the property of infants and others incompetent from any cause to manage their own affairs, though they be citizens of the United States.

It is a just and wise exercise of power, and rises above technicalities. The protection of property against alienation and incumbrance by those incompetent to appreciate the responsibilities of ownership, and, therefore, unable to resist designing men, is essential to the welfare of society, and, therefore, not subversive of the Constitution, but is in furtherance of its purpose to establish justice, insure domestic tranqul-ity, and to promote the general welfare.

Therefore we may concede that if the claimants were separated from their tribe and were *sui juris* and competent to manage their own affairs the acts extending the restriction upon the lands of the full-blood Indians might well be held a discrimination among the members of the tribe and an interference with the property rights of citizens of the United States, and, therefore, obnoxious to the Constitution in the sense that the right of alienation, incumbrance, and leasing of their lands was interrupted and delayed; nevertheless, as the restrictions were imposed for their manifest benefit, *i. e.*, that they might have the continued possession, ownership, and consequent enjoyment of their lands until such time as the Government was satisfied they were competent to repel designing men and manage their own affairs, we must hold the several acts valid and effective to accomplish the purpose for which they were enacted.

54

The petition is dismissed.

HOWRY, Judge, delivered the following dissenting opinion:

The grave constitutional questions presented relate to the right of Congress to increase and extend the restrictions originally placed upon the alienation, encumbrance, and the right to lease certain lands of Cherokee citizens of the United States beyond the terms of an act approved July 1, 1902, 32 Stat., 716, under which allotments were

made to individual Cherokees and for which separate certificates were issued for nontaxable homesteads made inalienable during the lifetime of the allottee not exceeding twenty-one years, but not liable in debt contracted by the owner while so held by him; and as to other lands allotted such lands were made inalienable for five years after issuance of the patents. The act of allotment provided that if any person whose name appeared upon the roll should die subsequent to September 1, 1902, and before receiving his allotment, the lands to which such person would have been entitled if living should be allotted in his name and (with his proportionate share of other tribal property) descend to his heirs according to the laws of Arkansas. These provisions were submitted by the terms of the allotment act to the Cherokee people, who by popular vote ratified and agreed to the same. The United States closed the transaction by the issuance of patents, and the several parties took possession of their property under certificates which vested the absolute title in the petitioners and those who with them became the owners in severalty of the land.

Furthermore, the act under which the conveyances were made provided that such conveyances when approved by the Secretary of the Interior should serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in the patent. It appears that the conveyances were approved according to law (sec. 59). By the acceptance of the patent every individual allottee was "deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in the allotment act and to relinquish all his right, title, and interest to the same, except in the proceeds of lands preserved from allotment." (Sec. 60.)

At the time of the passage of the allotment act every Cherokee had been made a citizen entitled to all such rights, privileges, and immunities as other citizens of the United States.

By an act approved March 11, 1904, 33 Stat., 65, the Secretary of the Interior was authorized to grant rights of way for the operation and maintenance of pipe lines for oil and gas through
55 the allotted lands of the petitioners for twenty years, and at the end of that period to extend the right to maintain such pipe lines for another period of twenty years. By another act, approved April 26, 1906, 34 Stat., 137, Congress attempted to impose further restrictions by forbidding any full-blood Cherokee to alienate, sell, or encumber any of the lands allotted to him for a period of twenty-five years from that date. Full bloods were given the privilege of leasing lands other than homesteads for more than one year, but only under government rules and regulations. Leases and rental contracts (except for agricultural purposes) of lands other than homesteads were to be ineffective without the approval of the Secretary of the Interior; and adult heirs of any deceased Cherokee whose selection has been made could convey lands inherited only when approved by the Secretary.

There is really nothing new to be said outside of the adjudicated cases and their proper relation to and bearing upon the issues. But with fixed ideas as to the meaning of a grant, and because no case (out of at least 100 discussed) has been cited which sustains the

proposition that land once granted can be seized and controlled by the Government except in the exercise of the right of eminent domain, I am unable to accept the Government's contention that the acts of Congress which attempt to do so are valid.

It is not meant to say that the act conferring citizenship upon the complainants either altered or affected the conditions which accompanied the original grant. But when the land was granted the character of the title allotted to the complainants and other full bloods was the same as if allotted to other citizens. The title of the one became as unqualified as the title of the other, and any attempt to differentiate between the fee so held can only be sustained upon the theory that the Indian can never acquire such a right to land as the Government is bound to respect.

Nor am I alone in this view, inasmuch as some of the ablest members of the United States Senate officially declared to Congress that the legislation known as the McCumber amendment was not valid; and a report to that effect was promptly acted upon by the same Congress that enacted a part of the legislation (which forms the subject-matter of the complaint here) by the passage of the act of our jurisdiction.

Preliminary to any discussion of the merits, the majority of the court seem to have made objectionable findings, as I view them; and though probably not intended to prejudice petitioners, some of them are calculated to mislead.

None of them are necessary, because the courts must take judicial notice of the only essential fact necessary to be considered—that allotments to land and other valuable rights were conferred by a law specifically enacted to carry out the treaties of the United States with the Cherokees, which those people accepted by complying with the conditions fixed for title to vest and *which the United States ratified by putting the parties in possession* under the patents of the Government. The attempt to set aside settled titles thus acquired is in violation of what the Supreme Court declared in Choctaw Nation, 119 U. S., 29, and again in U. S. v. Old Settlers, 148 U. S., 473, that "Where, in professed pursuance of treaties, statutes have conferred valuable benefits upon Indians, which the latter have ac-
56 cepted, they partake of the nature of agreements—the acceptance of the benefit, coupled with the condition, implying an assent on the part of the recipient to the condition."

The fourteenth finding of the court alleges that the full bloods "in the main" are in favor of the extension of the period of restriction upon alienation or incumbrance of the lands and the supervision of governmental authority over leasing as well as supervision of the sale of the inherited lands. Apparently, then, this litigation is a continuation of the local controversy existing between the headmen of the Cherokees and other allottees who, having possessed themselves of their property, naturally want to make use of it.

But these differences were concluded by the allotment act when ratified, and the Supreme Court recognized the force of the popular approval given to the act of July 1, 1902 (which made the allotments), by saying through Mr. Chief Justice Fuller in the Cherokee

Intermarriage Cases, 203 U. S., 93, that the majority of the natives voted against the acceptance. Nevertheless, the court affirmed the cases and closed the controversy with the statement that the allotments then being apportioned were according to the terms of the act which provided for them.

This disposes of the mere matter of what some of the full-bloods want, as the allotment scheme has accomplished by law that which the wishes of some of the individuals to the agreement can not now influence. The partisan statements of the few individuals who have undertaken to testify should no more influence the action of the court on the constitutional question than the report of the Senate committee on the same subject (predicated upon two volumes of printed testimony) to the effect that the later legislation was unwise and injurious to the Cherokees.

"While it is ordinarily true," said the Supreme Court, "that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, or other similar matters of judicial cognizance." 170 U. S., 32. As the judicial power is strictly limited to the determination of the power of Congress to interfere no testimony should or can be considered.

The lands in controversy, like the neutral lands in Holden v. Joy, 17 Wall., 211, were lands conveyed immediately and directly from the United States to the Cherokee Nation under the treaty of 1835, 7 Stat., 479. Assurances were given to the Cherokee Nation that such lands would be conveyed to them "in fee simple." When the Cherokee constitution was adopted the title to the common property passed from the communal owners and became vested in the nation. Whitmire's Case, 30 C. Cls., 154; Eastern Cherokees v. United States, 40 Ibid., 252; 202 U. S., 101. All these lands were conveyed by patent in execution of the stipulations contained in several treaties—those of May 6, 1828, February 14, 1833, and December 29, 1835—which granted the lands unto the Cherokee Nation "to have and to hold the same, together with all the rights, privileges, and appurtenances belonging unto the said Cherokee Nation forever." By article 4, of the treaty of 1846, it was agreed on the part of the United States that all these lands "shall be and remain the common property of the whole Cherokee people;" and the Cherokee
57 constitution (1839) provided that "the lands of the Cherokee Nation shall remain common property." Another treaty in 1866 resulted. Article 1 amending that treaty repeated the declarations of previous treaties that the lands of the Cherokee Nation should remain common property, but also carried a provision that such lands should remain common property "until the national council shall request a survey and allotment of the same in accordance with the provisions of article 20 of the treaty of July 19, 1866." In Red Bird et al., Citizens of the Cherokee Nation by Blood, v. United States, 203 U. S., 81, the Supreme Court recognized the completeness of the agreement in redemption of treaty promises and with the issuance of the patents the scheme was carried out according to that decision.

Especially does it seem unnecessary to attempt to arraign the motives and conduct of a whole people, whose efforts to develop a new country have led to criticism of purchasers and lessees as designing men. If it be true that many of the full-bloods were induced to make contracts to sell or encumber their allotments, in violation of the terms of the act of July 1, 1902, contingent upon the delivery of valid titles, those transactions do not concern this controversy, and the courts of Oklahoma are open to the grantors to set aside such contracts.

Many of the suits relate to the purchase of fractions of land reserved for town sites. Finding sixteen relates in part to these, and to transactions involving personal transfers under the act of 1902 for considerations not the subject of complaint and proper considerations which the grantors as well as the grantees supposed they had a right to give and receive. This right to buy and sell despite the act of 1906—which is the subject of the complaint—is the thing in issue; not that the Indian is yet a child unable to help himself, needing forty more years of segregation from his white brother, to be left standing in the path of progress, and unfit to be absorbed into the habits and industrial life of the people among whom his lot is cast as a citizen.

Passing to the consideration of the real issue which according to the requirements of the jurisdictional act the court must consider, the Government contention is: (1) That the acts of the Government authorized to be exercised by the subsequent legislation of April 26, 1906, do not amount to a taking of the property. The court adopts this contention, but it seems to me to beg the question.

Any interference which destroys the market value of an owner's individual property is the equivalent of a taking.

The inheritances provided for in the allotment act of July 1, 1902, had taken effect and fixed rights not only for those authorized to inherit, but also accomplished results for those intervening as purchasers or lessees within the limitations of the act which gave the allotments. The efforts of the Government now to control the land beyond the terms first fixed constitute the imposition of such penalties upon the present allottees in the use of their property as practically to convert the fee derived by them under the terms of the grant into a life estate—with limitations upon the use so serious in character as to even lessen the value of the life estate itself. These efforts attempt to surrender to the lawmaking power the right of continued interference not only as such interposition may affect the living generation but future generations of Indians as well in the control and enjoyment of private property held by as good a title as can be conferred by law.

58 "Some things lie too deep in the common sense and common honesty of mankind to require argument or authority to support them." So said the Supreme Court. Fixed rules which obtain everywhere for the protection of private property are in this class and apply to Indians in possession under a lawful grant as much as to others holding by a patent from the Government, regardless of citizenship.

The right claimed for the Government to grant rights of way for the operation and maintenance of pipe lines, oil and gas, through the allotted lands for twenty years and at the end of that period to extend the right to maintain such pipe lines for another period of twenty years would seem to any holder of land to be a taking of his property. The right to lease lands held in fee simple without governmental supervision and to grant rights of way for pipe lines to public-service corporations and others and directly receive the revenues arising therefrom is as much the individual right of the Indian as the right of any other citizen of the United States. If Congress can constitutionally provide for the interference indicated by its later legislation, they may equally provide other and different methods for the disposition of the interests involved and especially of those parties holding lands by inheritance. The compensation to be paid the allottees whose lands are attempted to be made subject to the easement indicated and provided to be fixed and collected by the Secretary of the Interior is a direct taking, even though the legislation is assumed to be for the benefit of those possessed of the allotments.

The grant of rights of way over the allotted lands is a violation of constitutional provisions.

Whether the pipe-line companies to which the Secretary of the Interior is attempting to grant rights of way under the later legislation are public corporations need not be considered. But independent of the character of these corporations to whom rights of way are proposed to be granted, it does not seem proper for any government officer to fix the compensation. Inasmuch as the Secretary of the Interior is given that right by the legislation which forms the subject-matter of the complaint it will be noted that the privilege of a trial by jury is denied, thereby burdening the owner of the estate with an improper easement and consequently infringing the prohibition against the taking of private property without due process of law. The exercise of governmental authority under the circumstances also means the taking for public use of property without adequate compensation. In its last analysis the exercise of such governmental authority means that private property is authorized to be taken for private use.

Again, section 19 of the act of April 26, 1906, makes all lands upon which restrictions are removed subject to taxation. This is in violation of the special privilege conferred by section 13 of the allotment act of July 1, 1902, exempting homestead allotments from taxation so long as such homesteads should be held by the allottees. This exemption from taxation was and is a valuable property right which legislation cannot destroy; and the attempt to destroy this right is a taking of property in the constitutional sense. For the reasons stated and because property once lawfully acquired by anyone cannot be so interfered with as to destroy or lessen any of the
59 rights of that property in the hands of the owner, there was such a taking as the Constitution forbids.

It is next contended by the Government (2) that the legislation subsequent to the act of July 1, 1902, operated to continue the tribal

government of the Cherokee Nation and the control by Congress of the property of the individual Cherokee, despite the allotment act which surrendered control of such land as was conveyed in fee simple to the individual members of the tribe. But the conclusion of the court—that the issuance of allotment certificates and conveyances to petitioners and other individual Cherokees vested in them the fee-simple title to the lands respectively—though correct, is inconsistent with the theory that the Government may destroy its patents because the owners are Indians.

The rights involved in the defense of the exclusive use and control of land by persons properly in possession as owners under the Government's patents are not such rights as come within the category of "technicalities," but are vested rights. "The enjoyment, present or prospective, by some particular person or persons in property as of present interest." Pearsall v. R. R. Co., 161 U. S., 646; Cooley's Constitutional Lim., 332.

It was the early English law that a vested right was "an immediate right of present or future enjoyment." Fearne's Contingent Rem. The right of property consists in the free use, enjoyment, and disposal of all the acquisition without any control of diminution save only by the laws of the land. 1 Blacks., 138.

Where land is granted, the legislative power is incompetent to annul the grant and give the land to another. Such a law is void. Fletcher v. Peck, 6 Cr., 87. A government is never presumed to grant the same land twice. 7 J. R., 8. A grant by act of Parliament which conveys a title good against the King takes away no right of property from any other; though it contains no saving clause, it passes no other right than that of the public although the grant is general of the land. 1 C. O., 274, *b;* 1 Bent., 176; 5 J. R., 263. In Arredondo's case, 6 Pet., 609, the principle is reaffirmed that where land is once granted, the legislative power is incompetent to annul the grant. A State cannot impose a tax on land granted with an exemption from taxation, New Jersey v. Wilson, 7 Cr., 164; nor take away a corporate franchise. Dartmouth College v. Woodward, 4 Wheat., 518. Where a second patent has issued to land such second patent would be void because of the previous grant. See Easton v. Salisbury, 21 How., 428. Where a certificate shows reservation under a treaty *and the action of the Indian in settling upon it* the production of a certificate to that effect from the proper officer makes the land reserved and any subsequent patent becomes void. Polk's Lessee v. Wendell, 9 Cr., 87; Bagnell v. Broderick, 13 Pet., 436. Allotment certificates, like certification of lists of land under special acts, convey a title as complete as patents. Barney v. Dolph, 97 U. S., 652; Frasher v. O'Connor, 115 U. S., 102; Noble v. Union River, 147 U. S., 165.

The inheritances provided for by this allotment act had taken effect, and, becoming effective, accomplished precisely that which any settlement could effect under any other kind of lawful agreement. Accordingly the right conferred by means of the inheritance of the

lands actually allotted became as much a vested right in the
60 person of the heir as the patent of the Government carried the vested right to the original allottee unless the Government could confer the fee and take it away because the beneficiaries were Indians.

But, said Chief Justice Marshall, this is a government of laws and not of men; and when the title vested in the Indian, either by direct allotment or by succession, the recipients were supposed to be as much within the protection of the law as others. The title could not vest and yet be subject to the control of the grantor. If it could, there was no investiture. This court is in entire harmony, however, that the title did vest. When it did there was nothing left for new legislation to operate upon as to the lands which had passed out of the control of the Government. As well might it be said if money had been distributed and annuities had been paid that subsequent legislation might provide for recovery as to say that a supplemental enactment could operate upon the title of land given absolutely to the individual.

Words of present grant excepted, the Supreme Court has been uniform in the holding that every patent passed a perfect and consummate title. Wilcox v. Jackson, 13 Pet., 498.

The whole question comes back to the proposition whether the United States, never having had a title of their own and having lost administrative control by carrying out its several treaty obligations, can now reestablish the relation of guardian and ward formerly existing between the Government and those receiving the allotments after the relation had been severed as to the property conveyed.

If "unlettered people" understood that their treaties meant what all others knew they meant the relation of guardian and ward ceased when the treaties were executed; and under the rule declared in Worcester v. Georgia, 6 Pet., 582, the treaties accomplished under the law with the consent of the tribe as well as the Government what both parties intended.

The theory of the majority is, citing Lone Wolf v. Hitchcock, 187 U. S., 553, and the Matter of Heff, 197 U. S., 488, that plenary authority over the subject-matter continues political, not subject to be controlled by judicial determination. The difficulty with the application of this proposition is the difference between the titles and the relations of the parties with respect to the tenures of the lands. The allottees here are neither communal owners nor is the property any longer common. Congress can by no act reassume control upon the theory that the property is of a community character, or that the tribe has any ownership in common of the allotted property. In Lone Wolf v. Hitchcock, *ante*, the Supreme Court planted further political authority squarely upon the proposition that the Indians there had not been emancipated from the control and protection of the Government in so far as that control and protection *related to the tribal lands of the parties concerned*, citing Choctaw Nation v. United States, 119 U. S., 1, and Stephens v. Cherokee Nation, 174 Ibid., 445. Mr. Justice White expressly put the decision upon Cherokee Nation v. Hitchcock, 187 U. S., 294, "where it was held

that full administrative power was possessed by Congress *over Indian tribal property.*" The court presumed for all four cases that Congress acted in good faith because the property *remained communal and common,* which meant unallotted lands. No such presumption can be applied in the case at bar because no refinement of language can make any property, where the title has been received as
61 a matter of individual right, a tribal interest in that property. It became individual and ceased to be tribal for any purpose.

Possibly treaties may properly be broken and new laws unsettling fixed rights may be desirable for the full bloods indefinitely, if each and all of them *individually* indicated consent.

But no request of the Cherokee government could be the basis of further legislative control, because the tribal government had only been retained for the purpose of distributing lands not allotted in severalty to those designated to receive the same. The proposition that governments of any kind can interfere here means for people supposed to be more civilized than any other class of Indians a kind of guardianship more arbitrary than anything ever yet declared.

The Supreme Court has never acquiesced in any such proposition. In New York Indians v. United States, 170 U. S., 23, the court rejected a proviso by saying: "There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of arrangement with * * * an Indian tribe" by the assertion of a material provision unknown to one of the contracting parties and kept in the background to be used by the other only when exigencies demanded.

In Jones v. Meehan, 175 U. S., 1, an allotment had been made not to a citizen of the United States but to an Indian. It was held that the title to the property could not be interfered with by any subsequent act of Congress or by the executive departments. The series of decisions reviewed by the court discloses that as the reserve sections became individual property the reservation became the "equivalent to a present grant of a complete title in fee simple;" alienable by the grantee at pleasure *unless by treaty or contemporaneous act* Congress restricted alienation.

In Garfield v. United States, ex rel. Goldsby, 211 U. S., 249, the court said that "it has always been recognized that one who has acquired rights by an administrative or judicial proceeding can not be deprived of them without notice and an opportunity to be heard"—thus defining the meaning and extent of constitutional practice against action without due process of law.

In Wallace v. Adams, 204 U. S., 415, the principle was affirmed that an allotment certificate when issued like a patent to land was dual in its effect because it was an adjudication of the special tribunal empowered to decide that the party to whom it was issued became entitled to the land and was a conveyance of the right.

In Wiggan v. Connolly, 163 U. S., 56, the court dealt with a contingent estate; the property was plainly tribal and not held in fee simple by the individual.

Preceding the act conferring citizenship upon the Cherokees, 31 Stat., 1447, doubts were stated by a committee report to Congress as

to whether the parties could perform any of the usual personal business engagements daily taking place on a vast scale where they lived without a technical violation of the laws requiring supervision of the Cherokees. A reason thus appeared for making these people citizens. It was one of the steps taken to discharge the recipients from the supervision of the agencies of the General Government. In the Matter of Heff, 197 U. S., 508, the Supreme Court held that Indians receiving the privileges of citizenship were outside of all
62 police regulations on the part of the Congress without the consent of the *individual* Indian and the State. The court said that the logic of the argument to the contrary implied that the United States could never release itself from the obligation of guardianship; that the reach to which the argument went for the assumption of the rights of guardianship which it has once abandoned demonstrated its unsoundness.

For the reason that political rights (protected so carefully for the Indian-made citizen in Heff's case) are of no greater importance and rise no higher than the property rights of the Indian citizen where, when the grant of the property right took effect, the Government abandoned its guardianship over the Indian—certainly to the extent of the land granted and put in his possession by the Government—the legislation which forms the subject-matter of this complaint does not seem to me to be a valid exercise of the legislative power. If it be valid legislation there is no limit to the exercise of political authority over an Indian grant no matter how ancient or how long held by the Indian beneficiary. And certainly there is a time when political control ceases to be plenary and lawful and can become arbitrary and unconstitutional.

63 VIII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the eighth day of February 1909, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of William Brown and Levi B. Gritts on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, be, and the same is hereby dismissed.

BY THE COURT.

64 IX. *Order of Court on Claimants' Motion for New Trial and Defendants' Motion for Amended Findings.*

On March 1, 1909 the claimants filed their motion for a rehearing and on March 27, 1909 the defendants filed their motion for amended findings of fact.

On March 29, March 31, and April 1, 1909 these motions were argued and submitted.

On June 10, 1909 the following order was filed by the Court:

Order.

The claimants' motion for a new trial is overruled.

Claimants' motion and defendants' motion to amend the findings are allowed in part and overruled in part, as shown by findings this day filed as of February 8, 1909. The judgment and opinion as rendered to stand.

Howry, J., will file a dissenting opinion before the allowance of any motion for an appeal.

BY THE COURT.

Filed June 10, 1909.

65 X. *Application for and Allowance of Appeal.*

In this cause come the petitioners by attorney and pray an appeal to the Supreme Court of the United States from the judgment of this court entered on the 8th day of February, 1909.

WM. H. ROBESON,
DAN'L B. HENDERSON,
JOHN J. HEMPHILL,
Attorneys for Petitioners.

Filed August 27, 1909.

Ordered: That the above appeal be allowed as prayed for.

STANTON J. PEELLE.
Chief Justice.

August 28, 1909.

66 In the Court of Claims.

No. 29987.

WILLIAM BROWN and LEVI B. GRITTS, on Their Own Behalf and on Behalf of All Other Cherokee Citizens Having Like Interest in the Property Allotted under the Act of July 1, 1902,

v.

THE UNITED STATES.

I, Archibald Hopkins, Chief Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusions of law filed by the Court; of the opinion of the Court and of the dissenting opinion by Howry, J.; of the final judgment of the Court; of the order of the Court on the motion of the claimants for re-hearing and of the defendants for amended findings of fact; of the application of the claimants for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 20th day of September, 1909.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 21,830. Court of Claims. Term No. 331. William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, appellants, vs. The United States. Filed September 20th, 1909. File No. 21,830.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

WILLIAM BROWN AND LEVI B. GRITTS, on their own behalf, etc., appellants, *v.* THE UNITED STATES. } No. 604.

APPEAL FROM THE COURT OF CLAIMS.

MOTION TO ADVANCE.

On behalf of the United States the Solicitor-General respectfully moves the court to advance the above-entitled cause for hearing with the case of *Marchie Tiger* v. *The Western Investment Company et al.*, No. 242, for the following reasons:

1. In both of the above-entitled cases the constitutionality of the same and similar provisions of law is involved. In the *Tiger* case the questions presented are: (1) Did the act of April 26, 1906 (ch. 1836, 34 Stat., 137, 144, 145), extend the restrictions previously imposed upon full-blood Creek Indians as to the allotted land inherited by them? (2) If so, was it within the power of Congress, after land had been allotted to full-blood Indians of the

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Five Civilized Tribes subject to certain restrictions, to extend these restrictions?

The *Brown* and *Gritts* case presents the same constitutional question, and other questions of a like character affecting the validity of the same and similar provisions of law.

2. While Brown and Gritts, who were specially authorized by the act of March 1, 1907 (ch. 2285, 34 Stat., 1015, 1028), to maintain this suit to test the validity of provisions extending restrictions upon alienation, encumbrance, and the right to lease allotments, are full-blood Cherokees, and Marchie Tiger is a full-blood Creek, they are all full-blood Indians of the Five Civilized Tribes, whose status and peculiar relation to the United States are to be determined by an examination of substantially the same legislation.

3. The interest of the United States in both suits is substantially the same, although the *Tiger* case is on its face a suit between private parties.

4. Many thousand conveyances have been made in violation of the provisions extending the restrictions above referred to. The title to a large amount of land in Oklahoma, as well as the status of the Five Civilized Tribes, is therefore involved in these cases. Consequently a full and speedy determination of all the questions involved in said cases is a matter of much public importance.

LLOYD W. BOWERS,
Solicitor-General.

APRIL, 1910.

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lands inherited by them, and whether, if this be so, it was within the power of Congress to extend such restrictions. The present case is a suit specially authorized to be brought against the United States by the act of March 1, 1907 (chap. 2285, 34 Stats., 1015, 1028), to determine the validity of the act of April 26, 1906, above referred to, in so far as such act extends the restrictions previously imposed upon full-blood Cherokee Indians as to lands allotted to them. In both cases the Indians concerned are members of the Five Civilized Tribes whose status and relation to the United States are to be determined by an examination of substantially the same legislation.

Upon this motion the court advanced the present case and assigned it for argument on the first day of the present term, but without reference to the *Tiger* case.

Under these circumstances, and in view of the fact that the presentation of this case on behalf of the Government has lately devolved upon other counsel, who have not participated in the preparation of the brief or argument, it is respectfully suggested that the above-entitled cause be reassigned, and if so reassigned, that it be heard together or in connection with the said *Tiger* case, No. 60 of the present term.

Respectfully submitted.

WADE H. ELLIS,
Special Assistant to the Attorney-General.

OCTOBER, 1910.

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Taylor *v.* Porter	4 Hill, 140.
United States *v.* Reese	5 Dill, 405.
Williston Seminary *v.* Hampshire Co	147 Mass., 427.

Sen. Rep. No. 5013	59th Cong., 2d Session.
H. R. Doc. No. 552	57th Cong., 1st Session.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 331.

WILLIAM BROWN AND LEVI B. GRITTS, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER CHEROKEE CITIZENS HAVING LIKE INTERESTS IN THE PROPERTY ALLOTTED UNDER THE ACT OF JULY 1, 1902,

vs.

THE UNITED STATES.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

Statement of Facts.

This cause is pending in this honorable court on appeal from the judgment of the Court of Claims, dismissing the petition.

The suit was brought by the appellants, William Brown and Levi B. Gritts, citizens of the United States, who are also full-blood Cherokee Indians by racial extraction, alleging that they were vested with title in fee simple to the lands conveyed to them by the Cherokee People, under the Cherokee allotment act of July 1, 1902 (32 Stat. L., 716) (Ap-

pendix B), is sought to be taken from them by the United States without due process of law and without just compensation, under two certain acts of Congress hereinafter referred to, from which they seek relief.

Relief is asked in the same case for all other Cherokee citizens having like interests with them in property allotted under the said allotment act.

The suit is brought under the act of March 1, 1907 (34 Stat., 1015, 1028) (Appendix A), which authorizes William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interests with them, to institute their suit in the Court of Claims to determine the validity of any acts of Congress passed since July 1, 1902, which seek to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens conveyed to them in fee simple, as provided by said act of July 1, 1902.

The pertinent portions of these acts are given in the appendix to this brief.

Prior to the allotment act the title to the lands involved herein was vested in fee simple in the Cherokees under a grant from the United States contained in the treaty of May 6, 1828 (7 Stat., 311), a grant which was ratified by subsequent treaties with the Cherokees in 1833, 1835, and 1846, and by a patent issued in 1838, in which patent the United States sought, however, to reserve unto itself an interest in the land, sometimes referred to by the courts as a "possibility of reversion" in case the Cherokee owners became extinct or abandoned the land. On account of the dissatisfaction of the Cherokees, the Treaty of 1846 secured all the lands to "the whole Cherokee people for their common use and benefit."

Under article 20 of the treaty of July 19, 1866 (14 Stat., 799), the United States agreed to cause the Cherokee lands to be surveyed and allotted among them as its own expense, upon request of the Cherokee National Council, and the

Cherokee allotment act was passed in pursuance of such request, the act providing in terms that it should not take effect or be of any validity until ratified by a majority of the votes cast by the legal voters of the Cherokee Nation (Rec., p. 20, Finding III).

The act was so ratified on August 7, 1902, and duly proclaimed August 12, 1902, thereby making it an agreement between the United States and the Cherokees (Rec., p. 20, Finding III).

Its purpose was to destroy the communal title of the Cherokee property and to allot and distribute the same in severalty among those Cherokees living on September 1, 1902, the date upon which such communal title was to terminate, and enrolled in accordance with the terms of the act.

The act of July 1, 1902, known also as the Cherokee agreement, provided that all enrolled Cherokees living on September 1, 1902, should receive their allotments of Cherokee lands, but that no child born thereafter to a Cherokee citizen should be enrolled or participate in the allotment; that an allotment should be land equal in value to 110 acres of the average allottable lands of the Cherokee Nation (sec. 11), out of which should be set apart to each allottee a homestead equal in value to forty (40) acres of such average lands (sec. 12), the remainder being commonly designated as surplus; that the agency for appraising the lands, enrolling the members of the tribe and issuing the allotment certificates to such members, should be the Commission to the Five Civilized Tribes, commonly known as the Dawes Commission (sec. 11), and to this commission was given exclusive jurisdiction to determine all matters relative to the appraisement and allotment of lands (sec. 22); that the allotment certificate should be conclusive evidence of the right of the allottee to the land therein described (sec. 21); that the Principal Chief of the Cherokee Nation should execute and deliver to the

allottee in whose favor such certificate was issued a patent conveying all the right, title, and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate (sec. 58), and that the conveyance, when made, should be approved by the Secretary of the Interior, and that such approval should serve to relinquish to the grantee all the right, title, and interest of the United States in and to the lands embraced in the patent (sec. 59); that the allottee by accepting the patent assented to the allotment and conveyance of all the lands of the tribe as provided in the act, and relinquished all right, title, and interest in and to allotments made to other Cherokees thereunder (sec. 60).

The patents provided were fee-simple deeds, granting to the allottees the whole estate owned by the Cheroke Nation (*i. e.*, Cherokee People), and all its citizens, in the land described therein, which grant was expressly subject to the following conditions, and none other, to wit:

1. That the homestead allotment should be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment (sec. 13).
2. That the homestead should be non-taxable, and should not be liable for any debt contracted by the allottee while held by him (sec. 13).
3. That neither the homestead nor the surplus allotment should be encumbered, taken or sold, to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of the act (sec. 14).
4. That the allottee should not, without the consent of the Secretary of the Interior, lease his lands for mineral purposes, nor for more than one year for grazing purposes, nor for more than five years for agricultural purposes, within the periods of inalienability above mentioned (sec. 72).

As stated above, these were the only conditions or limitations placed upon the allottee's power to use, control, and dispose of his allotment.

The allotment act was an agreement among the communal owners of the land for the extinguishment of the communal title and the vesting of the same in severalty in the individual Cherokees therein designated, namely, those to be enrolled and living on September 1, 1902; it made no distinction between the full-blood and mixed-blood as to the rigth each had to own, control, and dispose of his property acquired thereunder.

Appellants William Brown and Levi B. Gritts were enrolled, received their allotment certificates, and to them were issued patents to their respective allotments, executed in conformity with the provisions of the allotment act, and duly approved by the Secretary of the Interior (Rec., pp. 26-7, Finding XI).

Besides the lands acquired by appellant William Brown, as his own allotment, he, as sole heir of his son, Charles Brown, had inherited the lands allotted to Charles Brown, a duly enrolled member of the Cherokee Tribe, who had died September 1, 1904 (Rec., 27).

After appellants were so vested with title in their respective allotments and inherited lands, Congress attempted to increase and extend restrictions upon alienation, encumbrance, and right to lease the lands beyond those provided for in the act of July 1, 1902, by the passage of two acts, to wit:

1st. The act of March 11, 1904 (33 Stat., 65, Appendix C), by which the Secretary of the Interior was authorized to grant rights of way for the construction of pipe lines for oil and gas through the lands of the appellants for a period of twenty years, with the right of renewal for another period of twenty years, all without appellants' consent and without adequate provision for the ascertainment and payment of damages (Appendix C).

Under this act the Secretary granted such rights of way over the lands of appellants (Finding VII., Rec., p. 24).

2d. The act of April 26, 1906 (34 Stat., 137; Appendix

D), by sections 19, 20, 22, 23, and 25 of which the restrictions upon alienation, encumbrance, and the right to lease beyond those provided for under the allotment act of July 1, 1902, and are attempted to be increased or extended in the following respects, to wit:

a. The Cherokee full-bloods are made a distinct class from other members of the tribe, and, as such, are deprived of the power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to them until twenty-five years from the approval of the act of 1906, unless their restrictions are first removed by an act of Congress.

b. All leases and rental contracts of lands of full-bloods (other than homesteads), except leases for a period not exceeding one year for agricultural purposes, without the consent of the Secretary of the Interior, are declared absolutely void.

c. All lands of all allottees upon which restrictions have been, or may be, removed, whether such lands continue to be owned by the allottee or not, are made subject to taxation.

d. No full-blood Cherokee may convey, without the consent of the Secretary of the Interior, any land inherited from a deceased allottee in any of the Five Civilized Tribes, this inhibition being without limit in point of time, or location of the land within the territory of said tribes, and without reference to the person from whom the land is inherited, whether he was a full-blood, a mixed-blood, a freedman, or a white man, and also without reference to whether or not the land be inherited from one whose restrictions had been removed (Appendix D).

Under the Cherokee agreement such lands, if lying within the Cherokee domain, were alienable on August 7, 1907, and, if lying without the Cherokee domain, were not made subject to any restrictions upon alienation (Sec. 14).

The restrictions upon alienation of the surplus lands of appellant Levi B. Gritts have been removed; likewise the restrictions upon alienation of a part of the surplus lands of

appellant Brown (Rec., p. 27), thereby subjecting lands of both to increased encumbrance beyond that imposed under the act of July 1, 1902, and imposing restrictions upon his alienating, leasing, and otherwise disposing of his lands that did not previously exist.

c. No full-blood may lease his homestead, unless unable from infirmity or age to work or farm the same; and then only under rules and regulations prescribed by the Secretary of the Interior.

Other similar provisions, having for their purpose the increase of restrictions upon the appellant's right to own, use, and dispose of his property, are found in sections 23 and 25 of the act of April 26, 1906 (Appendix D).

The allotment act of July 1, 1902, under the terms of which these appellants took title, and the acts of 1904 and 1906, herein above referred to, may be contrasted as follows:

1. The act of 1902 contained no authority for the Secretary to grant rights of way for pipe lines for oil and gas through the lands of the appellants; but the act of 1904 confers authority upon the Secretary to grant such rights of way for forty years without the consent of the owner or adequate provision for ascertaining the reasonable value of such grant.

2. By the act of 1902 the homestead, if held by the allottee, was alienable after twenty-one years from the date of the certificate of allotment; but the act of 1906 forbids the full-blood to sell, dispose of or encumber it in any manner before April 26, 1931.

3. By the act of 1902 homestead allotments were made non-taxable for twenty-one years, if so long held by the allottee, and, in the event of the death of the allottee within the period of inalienability, said homestead would have descended to the heirs exempt from taxation until August, 1907; but by the act of 1906 homesteads became immediately taxable upon the death of the allottee or the removal of his restrictions.

4. By the act of 1902 surplus lands of appellants were alienable in five years after issuance of patent, but the act of April 26, 1906, declared that thereafter they should not have the power to sell, dispose of, or encumber in any manner such surplus until April 26, 1931. So, also, under the act of 1902, such surplus lands were not to be subject to taxation until the five-year period of inalienability had expired; but, by the act of 1906 such lands are made subject to taxation as soon as the restrictions are removed, even though the five-year period may not have expired.

5. Under the act of 1902 appellants received their allotments with the condition that they shall not be leased for grazing purposes for more than one year at a time, and for agricultural purposes for more than five years, without the consent of the Secretary of the Interior; but, by the act of April 26, 1906, full-bloods are deprived of the power of leasing their homesteads at all, except where from age or infirmity they are unable to work or farm the same, and surplus allotments of full-bloods may not be leased for more than a year without the consent of the Secretary of the Interior.

6. Under the act of 1902 the lands inherited by William Brown from his son Charles Brown were subject to the condition that rendered them inalienable until August 7, 1907; but, by the act of 1906 Wm. Brown is forbidden to alienate them forever without the consent of the Secretary of the Interior.

7. Under the act of 1902 inherited lands did not become taxable until five years from August 7, 1902; but by the act of April 26, 1906, they became taxable upon the death of the allottee or the removal of his restrictions.

After the approval of the act of April 26, 1906, the Secretary of the Interior prepared and promulgated regulations governing the leasing and sale of lands allotted to or in-

herited by appellants for the purpose of carrying into effect the foregoing provisions of the said act, thereby effectually subjecting appellants to the operation of the said restrictions (Rec., p. 25).

On December 21, 1906, appellant William Brown filed in the Supreme Court of the District of Columbia a bill attacking the validity of the act of April 26, 1906, and praying relief therefrom and to have the same declared to be in violation of the Constitution of the United States. But before a hearing on the application for writ of injunction could be had Congress passed the above-mentioned act of March 1, 1907, conferring jurisdiction upon the Court of Claims, with right of appeal to this court, to hear and determine this suit (Rec., p. 28).

By act of May 2, 1890 (26 Stat., 81), Congress had provided that the Constitution of the United States should have the same force and effect in the Indian Territory as elsewhere in the United States, and by the act of March 3, 1901 (31 Stat., 1447), had made appellants citizens of the United States, with all the rights, privileges, and immunities of such citizens.

The petition in this cause briefly sets forth the material facts, and contains special and general prayers for relief.

After traverse by defendants William W. Hastings, representing himself to be "the attorney-in-fact" for the Cherokee Nation (Rec., p. 19), filed an intervening petition in the Court of Claims, and was heard in argument at the submission of the case (44 C. Cl., 44) over the objection of appellants, who urged that the United States alone was proper party defendant, as provided in the act; that no recovery was sought against the Cherokee Nation; that the judgment herein could not affect the Cherokee Nation, and that there was no such body as the Cherokee Nation.

The findings of fact made by the court, seventeen in number, in addition to setting forth pertinent parts of the several acts of Congress involved in the controversy, includ-

ing the acts of July 1, 1902, March 11, 1904, April 26, 1906, and March 1, 1907, show that in 1838 there was a patent executed by the President of the United States conveying to the Cherokee Nation 14,374,135.14 acres of land, of which the lands involved in this suit are a part; that the Commission to the Five Civilized Tribes on May 11, 1900, began enrolling the citizens of the Cherokee Nation, were engaged thereat until March 4, 1907; on the first Monday of January, 1903, began allotting the lands to these citizens, and were then still engaged in the allotment of the same; that William Brown and Levi B. Gritts are the identical persons named in the act of March 1, 1907, are enrolled as full-blood Cherokees, have received allotment certificates and allotment deeds for their respective shares of tribal lands, both homestead and surplus, under the act of July 1, 1902, the findings showing the forms of such certificates and patents; that the restrictions upon alienation of a part of the surplus lands of William Brown and upon all the surplus lands of Levi B. Gritts had been removed; that William Brown, as heir of his son, Charles Brown, had inherited the latter's Cherokee allottment on September 1, 1904, either in fee simple or for life; that both the allotted and inherited lands of appellants are to a large extent suitable for both grazing and agricultural purposes.

The findings further set forth that in accordance with the act of April 26, 1906, the Secretary of the Interior prepared and promulgated regulations governing the leasing and sale of lands allotted to, or inherited by, full-blood Cherokee Indians for the purpose of carrying into effect the provisions of sections 19, 20, and 22 of the said act; that prior to the passage of the act many of the full-blood citizens of the Cherokee Nation had been induced by designing persons to execute deeds to their allotted lands and contracts to sell, and otherwise encumber the same in violation of the provisions of the act of July 1, 1902, and that since the passage

of the former act a large number of such deeds and contracts had been filed for record; that the full-blood enrolled citizens of the Cherokee Nation to whom lands have been allotted are, in the main, in favor of extension of the period of restrictions upon alienation, and are in favor of the supervision of the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands (Rec., pp. 19-29).

The court in its conclusions of law, seven in number, before dismissing the petition, holds that the joint resolution of Congress approved March 2, 1906, and section 28 of the act of Congress approved April 26, 1906, operated to continue the tribal government of the Cherokee Nation for all purposes under existing law until otherwise provided by law, and were a recognition by the political department of the government of the United States of the existence of that tribal government, and that appellants, being still members of the tribe, were not emancipated from the control of Congress by the act of March 3, 1901, conferring upon them citizenship of the United States, and that, notwithstanding their citizenship and the fact that they own their allotments and inherited lands by fee simple title, subject only to conditions imposed under the act of July 1, 1902, it was a valid exercise of the authority of Congress to impose on the lands the additional incumbrances created by the acts of March 11, 1904, and April 26, 1906, and to impose upon appellants the restrictions upon selling, encumbering, leasing and disposing of his lands that are contained in the latter acts, and that the acts of March 11, 1904, and April 26, 1906, in so far as they, or either of them, attempt to increase or extend the restrictions upon alienation, encumbrances, or the right to lease the allotments of lands of Cherokee citizens, beyond those authorized by the act of July 1, 1902, are valid statutes.

The court, in an opinion delivered by Chief Justice PEELLE, holds that the several acts complained of are valid statutes, alleging that the restrictions thereunder are for the manifest benefit of appellants, in order that the latter may have the continued possession, ownership, and enjoyment of their lands until such time as the Government is satisfied that they are competent to repel designing men and manage their own affairs.

The opinion justifies the segregation of the full-bloods into a class different from the other Cherokees and the imposition of greater restrictions upon them, and of additional encumbrances on their lands, with the statement that the full-bloods in the main are in favor of the restrictions and of the supervision of the Secretary of the Interior, and the further statement that the full-bloods are an uneducated and a less civilized class.

The opinion is based on the theory that appellants are still tribal Indians, wards of the Government, and it is said, in effect, that the action of Congress in thus disregarding the fact that they are citizens of the United States, owning lands acquired in fee-simple, with allotment certificates and patents therefor issued under the act of July 1, 1902, is a just and wise exercise of power, rising above legal technicalities.

That appellants continue to be tribal Indians is predicated upon the alleged continued existence of the tribal government of the so-called Cherokee Nation, which, in turn, is predicated upon the joint resolution of Congress, March 2, 1906 (34 Stat. L., 822), and section 28 of the act of Congress, April 26, 1906 (34 Stat. L., 137).

Yet the opinion concedes that if appellants were separated from the tribe and were *sui juris,* competent to manage their own affairs, the acts complained of might well be held unconstitutional.

The opinion holds that appellants, although citizens of the United States under the provisions of the act of March 3, 1901, and although individual owners in fee simple of *pri-*

vate property acquired from the so-called Cherokee Nation under allotment certificates and patents issued in accordance with the provisions of the act of July 1, 1902, are not by those acts emancipated from Congressional control, either as to their persons or their private property, but that Congress had the power, by subsequent legislation, to impose the new restrictions against alienation, encumbrance, or leasing upon appellants, and to add incumbrances on their lands beyond those imposed under the act of July 1, 1902, without violating any constitutional right.

HOWRY, J., in delivering the dissenting opinion in the case, holds that lands once granted cannot be seized and controlled by the Government except in the exercise of the right of eminent domain, and adds that he is unable to accept the Government's contention that acts of Congress which attempt to do so are valid.

Admitting that the act conferring citizenship upon appellants did not alter the conditions which accompanied the original grant, he holds that when the land was once granted the character of the title allotted to the appellants was the same as if allotted to other citizens; the title of the one became as unqualified as the title of the other, and any attempt to differentiate between the fees so held can only be sustained upon the theory that the Indian can never acquire such a right to land as the Government is bound to respect.

The learned judge, in announcing this proposition, cites the fact that some of the ablest members of the United States Senate, holding the same views, had officially declared to Congress that the legislation known as the McCumber act (Sec. 19, act April 26, 1906) was not valid.

Referring to some of the findings of fact, deemed by him unnecessary and objectionable, as being calculated to mislead, Judge Howry discusses particularly the 14th finding, which

is to the effect that full-bloods "in the main" are in favor of the extension of the period of restriction upon alienation, etc., and, regarding this, he says that such controversies as this between the classes of allottees were concluded when the allotment act of July 1, 1902, was ratified, and he calls attention to the declaration on this point by Mr. Chief Justice Fuller in the Cherokee Intermarriage cases (203 U. S., 93), adding the following:

> "The partisan statements of the few individuals who have undertaken to testify, should no more influence the action of the court on the constitutional question than the report of the Senate Committee on the same subject (predicated upon two volumes of printed testimony) to the effect that the latter legislation was unwise and injurious to the Cherokees."

The history and character of the Cherokee title is carefully stated by Judge Howry, starting, as he does, with the grant contained in the treaty of May 6, 1828, instead of the patent issued in pursuance of the act of Congress of May 28, 1830.

If it be true, the opinion declares, that many of the full-bloods were induced to make contracts to sell or encumber their allotments in violation of the terms of the act of July 1, 1902, contingent upon the delivery of valid titles, those transactions do not concern this controversy, and the courts of Oklahoma are open to the grantors to set aside such contracts.

Discussing the question whether the legislation of April 26, 1906, amounts to a taking of property, Judge Howry holds that the effect of the legislation as to a part of the property involved is practically to convert a fee into a life estate, and amounts to an attempt to surrender to the law-making power the right of continued interference, not only as such interposition may affect the living generation, but future generations of Indians as well, in the control and enjoyment of private property held by as good a title as can be conferred by law.

Analyzing the several statutes complained of and their effect, the opinion says:

> "The exercise of Government authority, under the circumstances, also means the taking for public use of property without adequate compensation. In its last analysis the exercise of such Government authority means that private property is authorized to be taken for private use."

The provision authorizing additional taxation beyond that provided for under the act of July 1, 1902, is discussed and declared a violation of constitutional right.

The opinion holds that the rights involved did not come within the category of "technicalities," but are vested rights, and that where land is once granted the legislative power is incompetent to annul the grant, and that a State cannot impose a tax upon land granted with an exemption from taxation.

In the course of the opinion, the vested rights involved in the inheritance accomplished by the act of July 1, 1902, are discussed and declared to be as real as the rights of the original allottee.

The opinion, referring to the legislation complained of, concludes with these words:

> "If it be valid legislation there is no limit to the exercise of political authority over an Indian grant, no matter how ancient or how long held by the Indian beneficiary; and certainly there is a time when political control ceases to be plenary and lawful and can become arbitrary and unconstitutional."

SPECIFICATIONS OF ERROR.

The Court of Claims erred—

1. In its conclusion that the joint resolution of March 2, 1906, and section 28 of the act of April 26, 1906, operated to continue the tribal government of the Cherokee Nation.

2. In its conclusion of law that the enrolled citizens of the Cherokee Nation "were not emancipated from the control of Congress by the act of March 3, 1901, conferring upon them citizenship of the United States."

3. In the conclusion of law that notwithstanding the citizenship of appellants, and notwithstanding its conclusion of law No. 5 that appellants owned their lands in fee-simple, the extension of the period of restrictions upon alienation to twenty-five years from April 26, 1906, within which no full-blood Cherokee citizen can alienate, sell, dispose of or encumber his allotted lands unless his restrictions are removed by Congress, or lease or sell his inherited lands without the approval of the Secretary of the Interior, is a valid exercise of the authority of Congress.

4. In the conclusion of law that, notwithstanding the citizenship of appellants, and notwithstanding the conclusion of law No. 5 that appellants owned their lands in fee-simple, the act of March 11, 1904, and the act of April 26, 1906, in so far as they, or either of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease allotments of lands of Cherokee citizens beyond those authorized by the act of July 1, 1902, are valid statutes.

5. In not holding that after appellants were vested with the fee-simple title to their Cherokee allotments and inherited lands, subject only to the conditions and restrictions imposed thereon by the act of July 1, 1902, Congress was without power to add other or further conditions, limitations

or restrictions upon their right to use, control, or dispose of the same, and was without power to impose further encumbrances thereon in the form of taxation.

6. In not holding that the act of March 11, 1904, accomplishes the taking of private property for private uses and is, therefore, invalid.

7. In not holding that the acts of March 11, 1904, and April 26, 1906, in so far as the said acts, or either of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease their Cherokee allotments or inherited lands, attempt to deprive appellants of their property without due process of law, and are therefore invalid.

8. In not holding, in pursuance of its conclusion No. 6, that appellant, William Brown, is the only heir at law of Charles Brown, deceased, and as such the owner of the allotment made to Charles Brown, that Congress was without power, after such allotment was so inherited, to add conditions or place restrictions upon William Brown's right to lease or sell the same.

9. In dismissing the petition.

I.

TRIBAL GOVERNMENT OF THE CHEROKEE NATION.

Prior to July 1, 1902, the tribal government of the Cherokee Nation had ceased.

Its destruction was completed by the act of June 28, 1898 (30 Stat., 495), commonly known as the Curtis act.

Under the doctrine laid down in Jones *vs.* Meehan, 175 U. S., 1, appellants submit that it is not material to the issues in this case whether the Government of the Cherokee Nation existed on March 11, 1904, and April 26, 1906, or not; but because great stress is laid, by the Court of Claims in its opinion, on the continuance of tribal government, and because a brief accurate statement of the history of the Cherokee Government may conduce to a clearer apprehension of some of the more important points to be discussed, we set forth the following account of the subject:

This court will take judicial notice that the Cherokees as far back as 1839 had a constitutional government modeled after that of the United States, with a legislative, executive and judicial branch, a written constitution and written laws, recognized and respected by the Government of the United States as being sovereign, and exclusive in power, within the territorial limits of the Cherokee Nation, subject only to the Constitution and certain acts of Congress regulating trade and intercourse with the Indians.

Early in the history of our Government the Cherokees had by treaties placed themselves under the protection of the United States, and, in turn, the United States (by the fifth article of the Treaty of 1835) had authorized the

Cherokees to make laws for the government and protection of their persons and property.

But about twenty years ago Congress adopted the policy of abolishing the Cherokee Government and its national existence, and continued that work down to the culminating act of July 1, 1902, referred to herein as the Cherokee Allotment Act, after which there remained merely the shell of the former government, which has been likened in its condition to an insolvent corporation.

The provisions of the Cherokee constitution relating to the election of the National Committee and Council and of Principal Chief are as follows:

> "SEC. 3. The National Committee shall consist of two members from each district, and the Council shall consist of three members from each district, to be chosen by the qualified electors in their respective districts for two years; the elections to be held in the respective districts every two years, at such times and places as may be directed by law.
>
> (Constitution Cherokee Nation, Article III.)

> "SEC. 1. The Principal Chief shall hold his office for the term of four years, and shall be elected by the qualified electors, on the same day, and at the places where they shall respectively vote for members to the National Council."
>
> (Constitution Cherokee Nation, Article IV.)

The following reference to acts of Congress, beginning in 1889, will show the stages by which the Cherokee Government was gradually diminished and ultimately destroyed.

By the act of March 1, 1889 (25 Stat., 783), a United States court was established in the Indian Territory with exclusive jurisdiction over all offenses against the laws of the United States committed within the Indian Territory not punishable by death or imprisonment at hard labor; also civil jurisdiction over controversies among citizens of the United States, and between a citizen of the United States and any other person residing or found in the Indian Territory.

By act of May 2, 1890 (26 Stat., 81), the jurisdiction of this court was further defined and more than forty chapters of Mansfield's Digest of the Laws of Arkansas, where made of force in the Indian Territory; and the Constitution of the United States and all general laws of the United States prohibiting crimes and misdemeanors in any territory within the exclusive jurisdiction of the United States, and all laws relating to banking associations, where made of force in the Indian Territory; and jurisdiction, civil and criminal, was conferred on the United States courts over controversies between members of different tribes in the Indian Territory.

By the act of March 3, 1893 (27 Stat., 645, sec. 16), the Commission to the Five Civilized Tribes, commonly called the Dawes Commission, was created expressly "for the purpose of the extinguishment of the national or tribal title" to the lands of the Five Civilized Tribes, either by cession to the United States or by allotment and division of the same in severalty among the Indians.

The declared purpose of so extinguishing the tribal title has never at any time been abandoned, but, on the other hand, has been constantly maintained as is shown by reference to the subsequent acts continuing and extending the work of this Commission among the Five Civilized Tribes, to wit: 28 Stat., 939; 29 Stat., 321; 30 Stat., 939; 31 Stat., 236, 1073; 32 Stat., 258.

By the act of June 10, 1896 (29 Stat., 339), the power of determining the right of Cherokees to enrollment as members of the tribe, which had formerly been vested exclusively in the Cherokee National Council, was given to the Dawes Commission, and this Commission was made the tribunal for passing upon all applications for admission, with the right of appeal to the United States Court in the Indian Territory.

By the act of June 7, 1897 (30 Stat., at p. 83), it is provided:

"That on and after January 1, 1898, the United States courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted, and all criminal causes for the punishment of any offense committed after January 1, 1898, by any person in said Territory, and the United States Commissioners in said Territory shall have and exercise the power and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereover as now conferred upon them in the trial of like causes."

It is also further provided in the said act (p. 84):

"That on and after January 1, 1898, all acts, ordinances and resolutions of the council of either of the aforesaid five tribes passed, shall be certified immediately upon their passage to the President of the United States and shall not take effect if disapproved by him, or until thirty days after their passage: *Provided,* That this act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with Commissioners heretofore appointed to treat with said tribes."

By the act of June 28, 1898 (30 Stat., 495), entitled "an act for the protection of the people of the Indian Territory, and for other purposes," and commonly known as the Curtis Act, it is provided:

"SEC. 13. That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals in said Territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void. No lease shall be made or renewed for a longer period

than fifteen years, nor cover the mineral in more than six hundred and forty acres of land, which shall conform as nearly as possible to the surveys" (pp. 498, 499).

"SEC. 16. That it shall be unlawful for any person, after the passage of this act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of any one else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any lands or property belonging to any one of said tribes or nations in said Territory, or for any one to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe to which they belong" (p. 501).

"SEC. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation" (p. 502).

"SEC. 26. That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory" (p. 504).

"SEC. 28. That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred

to the United States court in said Territory by filing with the clerk of the court the original papers in the suit; *Provided,* That this section shall not be in force as to the Chickasaw, Choctaw and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight" (pp. 504, 505).

By the act of July 1, 1898 (30 Stat., 571, p. 591), the right of appeal to the Supreme Court of the United States from the United States courts in the Indian Territory was granted in all citizenship cases.

By the act of March 31, 1900 (31 Stat., 236), the Commission to the Five Civilized Tribes was continued and certain enactments made with reference to their action in citizenship cases.

By the act of March 3, 1901, the Commission to the Five Civilized Tribes was authorized and directed to fix a time by agreement with either of the Five Civilized Tribes for closing the rolls, and provided that no ordinance or resolution of the Creek or Cherokee Tribes, except resolutions for adjournment, should be of any validity until approved by the President of the United States (31 Stat. L., 1077).

By another act approved March 3, 1901 (31 Stat., 1447), all citizens in the Indian Territory were made citizens of the United States.

By Act of July 1, 1902, it is provided:

"SEC. 63. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

"SEC. 64. The collection of all revenues of whatsoever character belonging to the tribe shall be made by an officer appointed by the Secretary of the Interior, under rules and regulations to be prescribed by the said Secretary.

"SEC. 66. All funds of the tribe, and all moneys accruing under the provisions of this act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an ap-

pointed officer of the United States, under the direction of the Secretary of the Interior.

"SEC. 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable and he shall make all needed rules and regulations to carry this provision into effect.

"SEC. 73. The provisions of section thirteen of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall not apply to or in any manner affect the lands or other property of said tribe, and no act of Congress or treaty provision inconsistent with this agreement shall be in force in said Nation except sections fourteen and twenty-seven of said last-mentioned act, which shall continue in force as if this agreement had not been made."

Having failed in the expectation that the whole property of the Cherokee Nation would be finally distributed by that date, Congress on March 2, 1906 (34 Stat., 822), by a joint resolution declared:

"The tribal existence and present tribal governments of the Choctaw * * * Cherokee * * * Tribes or Nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law."

Afterwards, by section 28 of the act of April 26, 1906 (34 Stat., 148), it was enacted that:

> "The tribal existence and present tribal governments of the Choctaw * * * Cherokee * * * Tribes or Nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, etc."

From the foregoing statutory enactments it is clear that the Cherokee tribal government had been abolished. The National Treasury had been destroyed, the Cherokee courts, judiciary and law, had been done away with, the power of the National Council to enact laws had been taken away, the terms of office of the Principal Chief and of the members of the National Council had expired, and there was no law under which an election could be held; so that there were no laws, no legislature, no courts, no treasury, no tribal officers, and no tribal government.

Under the act of July 1, 1902, certain clerical work connected with the allotment of lands, the sale of town lots, the continuing of the Cherokee schools, &c., was assigned to the quondam Principal Chief and to the so-called National Council, but such duties were ministerial and subject to the Secretary of the Interior, and the language of section 63 of the act wherein the term "tribal government" and "Cherokee Nation" are used, must be read in the light of the foregoing facts, and of the further purpose to defeat any claim of the Missouri, Kansas & Texas Railroad, as will appear hereafter in the argument of the case.

II.

FULL AND UNQUALIFIED CITIZENSHIP.

By the act of March 3, 1901 (31 Stat. L., 1447), every Indian in the Indian Territory is declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, without in any manner impairing or otherwise affecting his right to tribal or other property.

Congress by the act of May 2, 1890 (26 Stat., 96), extended the Constitution of the United States over the Indian Territory. The 14th Amendment declares: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

By these laws the Cherokees were emancipated from any other control of Congress than that exercised over all citizens.

It is to be observed that under the allotment act of July 1, 1902, no different conditions are attached to the allotted and inherited lands of full-blood Cherokees from those of the mixed-bloods, while the act of April 26, 1906, distinguishes between full-blood and mixed-blood Cherokees and seeks to affect only the former. Since both the full-bloods and the mixed-bloods are citizens of the United States, with equal rights in their Cherokee lands, it is impossible for Congress to enact any valid law treating the one class of persons in a different manner from that adopted toward another class, with regard to the right to own, use and dispose of the same.

That the United States cannot make distinctions of any kind between its citizens on account of race or color is so plain that authority is hardly necessary.

We show, however, that it has been adjudged that an Indian citizen of the United States has the same responsibility, and therefore necessarily the same rights, as a white man.

In the case of Felix *vs.* Patrick, 145 U. S., 317, 331, where the duties and responsibilities of Indians are discussed it is said:

> "It is practically admitted in this case that, in 1887, when their relations with their tribe were severed by accepting allotments of land in severalty under the treaty of April 29, 1878, they became citizens of the United States; that they were then chargeable with the same diligence as white people in the discovery of this fraud; and, as their bill was filed in 1888, it is claimed that they fulfilled all the requirements of law in this particular."

In the case of Heff, 197 U. S., 488, where the defendant had been indicted for selling liquor to an Indian under a statute forbidding such sales to any Indians to whom allotment of land had been made, the court declared—

> (1) That the allottee under the act becomes a citizen of the United States immediately upon his allotment, without waiting for the expiration of the twenty-five year period in which his land is to be held in trust;
>
> (2) That the conferring of citizenship upon an Indian emancipates him from the guardionship of the United States, which cannot be afterwards resumed by Congress without the consent of the Indian and the State wherein he resides;
>
> (3) That this emancipation is not affected by the fact that the act conferring citizenship upon the Indian also allots him land subject to conditions against alienation and encumbrance for a specified time;
>
> (4) That the act under which conviction was had, was unconstitutional, being a mere police regulation affecting Indian citizens of the United States, over whom Congress has no more power that it has over any other class or race of citizens.

Certainly this opinion clearly determines that whatever right of control the United States may have had at any time over the Cherokee Indians, it has passed out of the United States by the grant of full and complete rights of citizenship, and that, as citizens, the allotted Cherokee Indians may avail themselves of every privilege granted under the laws and the Constitution to every other citizen of the United States—white, black, yellow, or red.

In the case of Viles, 139 Fed. Rep., 68, 70, the court said:

> "I understand the decision of the Supreme Court in the Heff case as a broad declaration of a fundamental principle * * * that when an individual has once acquired the rights and privileges of a citizen, and becomes subject to State laws, his status cannot be changed by an act of Congress without his individual consent and the concurrent assent of the State in which he resides."

The dissenting justice in the case at bar says:

> "In Garfield *vs.* United States *ex rel.* Goldsby, 211 U. S., 249, the court said that 'it has always been recognized that one who has acquired rights by an administrative or judicial proceeding can not be deprived of them without notice and an opportunity to be heard'—thus defining the meaning and extent of constitutional practice against action without due process of law" (Rec., 48).

In support of its second conclusion of law, holding that the enrolled Cherokees were not emancipated from the control of Congress by the act of March 3, 1901, the Court of Claims declares:

> "But independent of the findings the court will take judicial notice of the Indians as wards of the Nation, and their consequent dependence upon the Government as their guardian" (Rec., 38, bottom of page).

This doctrine would be applicable in this case if these Cherokees were, in fact, "wards." Instead of being "wards," each one of them is a full-fledged citizen of the United States; the Government is not their guardian, but their servant. When an Indian is created a citizen of the United States, and the Constitution is put in force over him and his country, he necessarily ceases to be a "ward," and the Government can no longer be his "guardian."

In U. S. *vs.* Boyd *et al.*, 68 Fed. Rep., 577, which involved the relation of the Eastern Band of Cherokees to the United States, the court said:

> "At the threshold of this case the question is raised as to the jurisdiction of this court, and that question depends upon the relation which the United States bears to these Cherokee Indians. Are they under the guardianship of the United States as tribal Indians are, or are they citizens of the United States, with all the rights, powers, duties and obligations of such citizens? The decision of this question is necessary before discussing any other questions in the cause."

Thus the court draws sharply the contrast between a citizen of the United States and a tribal Indian under guardianship, and makes that the absolute test of its jurisdiction.

The court concluded in that case that citizenship in the United States had not been conferred upon the Cherokee Indians at that time, that they had not been otherwise discharged from Federal guardianship, and inasmuch as the property in dispute was *clearly tribal property,* the court had jurisdiction.

In the act of March 3, 1871, now section 2103, Rev. Stat., regulating Indian contracts, Congress confined its action to contracts "with any tribe of Indians, or individual Indians *not citizens of the United States,*" thereby clearly and fully recognizing that the individual Indian who is a citizen of the United States cannot be subjected

to the control of Congress in the exercise of his individual rights.

The same principle was recognized by Congress in the act of May 8, 1906 (34 Stat., 182), amending section 6 of the general allotment act of February 8, 1887 (24 Stat., 388). By the general allotment act, as originally passed, every Indian became a citizen of the United States upon the completion of his allotment and the patenting of the lands to him. By amendment of May 8, 1906, he does not become a citizen until after the expiration of the trust period of twenty-five years.

If the grant of citizenship affords no protection against control by Congress, and if the citizen Indian and his property are subject to the dominion of Congress to the same extent as one who is not a citizen, why did Congress pass this amendment and thus defer the grant of citizenship for twenty-five years?

In the case at bar the Cherokees have unquestionably been made citizens of the United States and discharged from Federal guardianship, and the property involved is so far from being tribal property, that it is in law and fact individual property held in severalty, independently, and even adversely to the tribe, if any such tribe exist.

It was allotted to these individual owners through the agency of the Dawes Commission, which was created by Congress expressly "for the purpose of the extinguishment of the national or tribal title" to these lands.

The Court of Claims declares that the acts of 1904 and 1906 are analogous to the protection afforded by the States to the property of infants and others incompetent, from any cause, to manage their own affairs, though they be citizens of the United States (R., 40). The analogy does not exist. The complaint in this case is the absence of just such judicial machinery, due process of law, as is afforded by the States.

It is worthy of note that the Court of Claims quotes from Lone Wolf *vs.* Hitchcock (187 U. S., 553, at 565) (R., 35)

the exact language previously quoted by the Supreme Court in the case of Heff (197 U. S., 488, at 498), and that the Supreme Court reached the conclusion in the Heff case that the Indian had been emancipated by the grant of United States citizenship and was no longer the ward of the Government, and that the Government was powerless to control the sale of intoxicating liquors to him. The Court of Claims, on the other hand, quoting exactly the same language, reaches precisely the opposite conclusion; and, notwithstanding the decision of this court in the Heff case, held that the grant of United States citizenship did not emancipate the Indians of the Five Civilized Tribes, that they are still wards of the Government, that the Government is still their guardian and that Congress has such absolute control of them and their property that the court is powerless to furnish them any protection whatever.

A distinction was attempted to be made between the Heff case and the case at bar, because the former related to political and civil rights, while the latter related to property. It is true that property rights are involved in this case, but so are the civil and political rights of these Indian citizens; and surely if Congress was without authority to protect the Indian against the use of liquor, as was decided in the Heff case, because he had been made a citizen of the United States, this court cannot find that the protection of the civil and political right of a citizen to manage and control his own property is less sacred than his right to destroy himself with intoxicating liquors. In the Heff case the citizenship in question was acquired under the act of February 8, 1887 (24 Stat., 388), and that of the Cherokees in this case under the act of March 3, 1901 (31 Stat., 1447), amending the former act by making it applicable to "every Indian in the Indian Territory." In these two cases the "citizenship" is identically the same and the conclusions are diametrically opposite.

In the Heff case (197 U. S., 488, at 499) the court declared that of late years a new policy had been entered upon by

Congress which looks to the breaking up of tribal relations, the establishing of separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. That is exactly the policy adopted toward the Indians of the Five Civilized Tribes, and this court held in the Heff case that when Congress had once terminated the guardianship over the Indian and established him as an American citizen, it was too late to retrace its steps and restore him again to the guardianship from which he had been released.

In the early Civil Rights Cases, *109 U. S.*, p. 25, the court says:

> "There must be a time when a former slave takes the rank of a *mere* citizen, ceases to be the *special favorite* of the law, and when his rights as a *citizen* are to be determined by the ordinary modes by which other men's rights are protected."

The same thing must be true of the civilized Indians.

Has that time come?

The Constitution of the United States has been expressly made applicable to the country where he resides; he has been made a citizen of the United States; his own government has been stripped of *all power* and he is made subject to the laws of the United States.

Surely the time is already here when he must be judged by the same rules as other citizens.

III.

CHEROKEE ALLOTMENT ACT OF JULY 1, 1902.

The act of July 1, 1902, commonly known as the Cherokee Agreement, and so designated in section 73 thereof, was a proposition submitted by Congress to the Cherokees, accepted and ratified by them, and adopted by both parties for the purposes of allotting and distributing all the Cherokee lands and funds to those members of the tribe enrolled in accordance with the terms of the act and living on September 1, 1902. Under this act appellants became vested with fee simple titles to their lands.

This act supersedes the Constitution and laws of the Cherokee Nation, and all treaties and laws of Congress regarding the ownership of Cherokee lands, destroys the communal title thereof and provides for a partition of the same among the former communal owners.

All right, title and interest of the Cherokee owners, called the Cherokee Nation, and of every citizen thereof, in each particular allotment is conveyed to the allottee by the patent issued to him.

The question arises, What right, title and interest had the Cherokee Nation (so called) and the citizens thereof in these lands so conveyed by patent to an allottee?

The question is thus answered. Article II of the treaty of May 6, 1828 (7 Stat. L., 311), declares that:

> "The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven million acres of land, to be bounded as follows:" etc.

Article I of the treaty of February 14, 1833 (7 Stat. L., 415), provides that:

> "The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee, is hereby pledged, of seven million acres of land to be bounded as follows:" etc.

By the treaty of December 29, 1835 (7 Stat. L., 478-480), the Cherokees relinquish to the United States all their lands east of the Mississippi River, and Article II provides:

> "Whereas by the treaty of May 6, 1828, and the supplementary treaty thereto of February 14, 1833, with the Cherokees west of the Mississippi the United States guaranteed and secured to be conveyed by patent, to the Cherokee Nation of Indians the following tract of country." * * * (describing the same land.)

The treaty further provides that in consideration of the sum of five hundred thousand dollars the United States "hereby covenant and agree to convey to the said Indians and their descendants by patent, in fee simple" an additional tract of land.

Article III of said treaty declares:

> "The United States also agree that the lands above ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to Cherokee Nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830."

The act of May 28, 1830, referred to in this article, provides in section 3 as follows:

> "That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them;

and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same" (4 Stat., 411, 412).

In accordance with the provisions of the foregoing treaties and laws, the United States, on December 31, 1838, issued a patent to the Cherokee Nation for the lands described in said treaties, which, after reciting the provisions of the said several treaties relating to said lands, provided as follows:

> "Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted, and by these presents do give and grant, unto the said Cherokee Nation, the two tracts of land so surveyed and hereinbefore described, containing in the whole fourteen million three hundred and seventy-four thousand one hundred and thirty-five and 14/100 acres (14,374,135.14);
>
> "To have and to hold the same, together with all the rights, privileges, and appurtenances thereto belonging, to the said Cherokee Nation forever; subject, however, to the right of the United States to permit other tribes of Red Men to get salt on the salt plain and on the western prairie referred to in the second article of the treaty of the 29th of December, one thousand eight hundred and thirty-five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by the said article; and subject also to all the other rights reserved to the United States, in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are so reserved; and subject also to the condition provided by the act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above-recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the same."

Article I of the treaty of August 6, 1846 (9 Stat., 871), provides:

"That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same. * * *"

This patent was never issued.

Regarding the character of the grant contained in the patent of 1838, it has been said:

"This Indian title being a base, qualified, or determinable fee, with only the possibility of reversion, and not the right of reversion, in the United States, all the estate is in the Cherokee Nation of Indians."

U. S. *vs.* Reese, 5 Dill., 405, 412.
In re Wolf, 27 Fed. Rep., 606, 607, 615.
Cherokee Nation *vs.* Southern Kans. R. R. Co., 33 Fed. Rep., 900-905.

The Cherokee title rests upon the grant contained in the treaty of 1828 and not upon the patent.

Holden *vs.* Joy, 17 Wall., 211.

By the Constitution of the Cherokee Nation, it was provided in Article I, section 2, that "the lands of the Cherokee Nation shall remain common property," and by the first amendment to Article I of said Constitution, in section 2 thereof, it was provided that "the lands of the Cherokee Nation shall remain common property until the National Council shall request the survey and allotment of the same in accordance with the provisions of Article XX of the treaty of the 19th day of July, 1866, between the United States and the Cherokee Nation."

"ART. XX. Whenever the Cherokee National Council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them at the expense of the United States."

By act of the Cherokee Council at its session of 1901, a formal request for the division and allotment of said lands was made (H. R. Doc. No. 552, 57th Cong., 1st Sess.), and in pursuance of said request the Allotment Act of July 1, 1902, was passed by the Congress and ratified by the Cherokee people.

With this request of the Cherokee Council, the lands of the Cherokees became subject to allotment among the Cherokee people.

It will be noted that by section 58 of the Cherokee Allotment Act of July 1, 1902, the Secretary of the Interior is to furnish the Principal Chief of the tribe with blank patents to be executed by the chief and delivered to the allottee. This deed is executed for and on behalf of the Cherokee people, or nation so-called, in whom the whole title was vested.

Section 59 of said act provides that each of these conveyances shall be approved by the Secretary of the Interior, which shall serve as a *relinquishment* to the grantee of all the right, title and interest of the United States in his allotment.

There was no title then in the United States to these lands as a matter of fact, in view of the decision in Holden *vs.* Joy, *supra,* but this provision was inserted doubtless to remove any question that might otherwise have arisen under the patent of 1838.

IV.

THE ACTS OF MARCH 11, 1904, AND APRIL 26, 1906.

These two acts in the respects complained of constitute a taking of private property without due process of law.

The lexicographer says that property is "the exclusive right of possessing, enjoying, and disposing of a thing;" and he is, perhaps, as accurate in this definition as the courts have been.

It is said that—

> "Property, in its broadest and most comprehensive sense, includes all rights and interests in real and personal property, and also any easements, franchises and incorporeal hereditaments" (Met. City Ry. Co. *vs.* Chicago R. R. Co., 87 Ill., 317).

> "Property in its appropriate sense means that dominion and indefinite right of user and disposition which one may lawfully exercise over particular things and objects, and generally made to the exclusion of all others" (Rigney *vs.* Chicago, 102 Ill., 64; Dorman *vs.* State, 34 Alabama, 239).
>
> "The word is *nomen generalissimum* and extends to every species of value in interest, including real and personal property, easements, franchises and other incorporeal hereditaments" (Boston Ry. Co. *vs.* Salem Ry. Co., 2d Gray, 35; People *vs.* Mayor of Brooklyn, 9 Barb., 535; Springfield Insurance Co. *vs.* Allen, 43 N. Y., 389; Williston Seminary *vs.* Hampshire Co., 147 Mass., 427).
>
> "The mere possession of real estate is constantly treated as property" (King *vs.* Goertz, 70 Cal., 240).

We come now to consider the act of March 11, 1904, which act undertakes to empower the Secretary of the Interior to grant rights of way for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any lands which have been allotted in severalty to Cherokee citizens without regard to the quantum of Indian blood.

By this act Congress has assumed to empower the Secretary to dispose of private property belonging to Cherokee allottees for private use, and to exercise the right of eminent domain, and to fix and determine the value of the easements thereunder acquired, and to give him power to grant such rights for a period of twenty years, and at the end of this period to renew the easement for another twenty years.

It is to be noted that the granting of such rights of way is possible only under the sovereign's right of eminent domain. This right can be enforced by the Government in the first place only for public corporations. There is no law under which the rights of one individual may be taken from him and conferred upon another individual. In other words, private property can never be taken except for public use; and then only upon the payment of just compensation, which is a question for judicial determination.

Even if the granting of rights of way by the Secretary were limited to public corporations, the right of the citizen to have such power exercised by the tribunal provided by law—in other words, by due process of law—is, by this act, utterly destroyed. This is true also if the Secretary may fix a compensation, for the allottee has the right also to have the question of compensation likewise determined.

It is evident that this act, putting into the hands of the Secretary the exercise of the right of eminent domain, and giving him the power to take rights from one individual and to bestow them upon another, and authorizing him to determine the compensation, proceeds upon the theory that, the allottees being Indians, they continue to be under the

control and supervision of the Secretary of the Interior and are not protected by the Constitution, which has, by act of Congress, been extended over their country.

Under this act the Secretary has granted rights of way to a number of corporations through the private property of a large number of Cherokee citizens (Rec., 24), and he has determined for himself the amount of damages to be paid for such rights of way.

So long as the Cherokees were wards of the Nation and were not citizens of the United States, and while their property was held in common, such contracts might have been made as to tribal lands by the Secretary of the Interior under the authority of an act of Congress; but when Congress conferred citizenship upon the Cherokee Indians, there is not the slightest doubt that they became instantly entitled to have their property rights protected by the judicial tribunals of the country in the same manner as other citizens; and, unless this court is ready to hold that the citizens of the United States are not equal in their rights and privileges—that citizenship means one thing to one man and another thing to another, and that it means different things to different men because they are of different color or different races—it must declare this act of March 11, 1904, to be, in the particulars mentioned, in violation of both constitutional provisions—that private property shall not be taken for public use without adequate compensation, and that the exercise of such power as is provided for the Secretary of the Interior accomplishes a taking of the property of allottees without due process of law.

To place restrictions upon the lands owned by the Cherokee Indians, citizens of the United States, as is attempted by the act of April 26, 1906, is a deprivation of property within the meaning of that term as used in the Fifth Amendment to the Constitution.

> "The constitutional guaranty, that no person shall be deprived of his property without due process of

law, may be violated without the physical taking of property for public or private use. Property may be destroyed or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capacity for the enjoyment, and adaptability to some use are essential characteristics and attributes without which property cannot be complete, and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."

In the matter of Jacobs, 98 N. Y., 99-105.

"Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision."

People *vs.* Otis, 90 N. Y., 48, 52.

"The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution save only by the law of the land."

1 Blackstone's Commentaries. 138.

"There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution."

Pumpelly *vs.* Greenbay Co., 13 Wall., 167, 177.

U. S. *vs.* Alexander, 148 U. S., 187.

Montana Co. *vs.* St. Louis Min. Co., 152 U. S., 169.

Central Trust Co. *vs.* Hennen, 90 Fed. Rep., 597.

George Bird, a member of the Puyallup tribe, was allotted certain lands in accordance with the 6th article of the treaty with his said tribe, which treaty provided for such allotment and conveyance upon certain conditions and with certain restrictions as to alienation, subject to which the allotted lands were to belong to the allottees and to be in-

heritable by their heirs. Under the provisions of the treaty, allottees were permitted to lease their allotted lands for terms not exceeding two years. Bird was given possession of his allotment in January, 1881. Subsequent to the occupation of his allotment by Bird, the Secretary of the Interior made certain rules and regulations respecting the leasing of Indian lands, providing that such leases could not be made unless submitted to and approved by the Secretary of the Interior, and that all the rental money should be paid to the Indian agent for the allottees. Bird had made a lease of his land without the approval of the Secretary of the Interior. It was held by the United States Circuit Court for the Western District of Washington that a patent to an Indian under such treaty, which recited the terms of the grant, conveyed to him a vested estate which could not be taken away or affected by any subsequent action of the Executive Department, so long as the allottee complied with the conditions; and that Bird had become a citizen of the United States and was entitled to all the rights of other citizens; that he might prosecute and defend any suit in respect to his property rights, and that his ownership and use of land which had been patented to him under a treaty were matters not subject to the decision or control of either Congress or the Executive branch of the Government. Upon this latter point the court said:

> "He is a citizen of the United States and entitled, equally with other citizens, to make a lawful use of his own property, and to prosecute and defend in the courts of this State, and in the courts of the United States, actions affecting his legal rights with respect to property, and to make contracts, not prohibited by law, including leases of the land in question for terms not exceeding two years. Having a complete vested estate in the land, and being endowed with the rights of citizenship, George Bird is under the protection of the guaranties of the Constitution of the United States, so that neither Congress nor the Executive branch of the Government can divest him of his property, nor deny to him the

> equal protection of the laws in a manner which would violate the constitutional rights of any other citizen * * * nor (can he) be subjected to the control of Government functionaries in the matter of leasing his lands for a term not exceeding the time limit specified in his patent."
>
> Bird *vs.* Terry, 129 Fed. Rep., 472, 477.

The opinion in this case combines the legal principles applicable to the title of an Indian allottee as laid down by this court in the case of the Kansas Indians, 5 Wall., 737, and that of Jones *vs.* Meehan, 175 U. S., 1.

What constitutes the taking of property without due process is admirably stated in the opinion of the dissenting justice in the case at bar as follows:

> "Any interference which destroys the market value of an owner's individual property is the equivalent of a taking.
>
> "The inheritances provided for in the allotment act of July 1, 1902, had taken effect and fixed rights not only for those authorized to inherit, but also accomplished results for those intervening as purchasers or lessees within the limitations of the act which gave the allotments. The efforts of the Government now to control the land beyond the terms first fixed constitute the imposition of such penalties upon the present allottees in the use of their property as practically to convert the fee derived by them under the terms of the grant into a life estate—with limitations upon the use so serious in character as to even lessen the value of the life estate itself. These efforts attempt to surrender to the law-making power the right of continued interference not only as such interposition may affect the living generation but future generations of Indians as well in the control and enjoyment of private property held by as good a title as can be conferred by law.
>
> " 'Some things lie too deep in the common sense and common honesty of mankind to require argument or authority to support them.' So said the Supreme Court. Fixed rules which obtain everywhere for the protection of private property are in

this class and apply to Indians in possession under a lawful grant as much as to others holding by a patent from the Government, regardless of citizenship."

V.

What Constitutes Due Process of Law?

There is no single, comprehensive definition of the term. It is said that due process of law means such an exercise of the power of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs (Cooley's Constitutional Limitations, sec. 356).

In the Dartmouth College case, Mr. Webster said:

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass in the form of an enactment is not, therefore, to be considered in the law of the land" (*ibid.*, 252, 253).

Citing a number of authorities, Cooley says:

> "The words 'by the law of the land,' as used in the Constitution, do not mean a statute for the purpose of working the wrong. That construction would render the restriction absolutely nugatory and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen unless you pass a statute for that purpose. In other words, you shall not do wrong unless you choose to do it'" (*ibid.*, 353).

It is otherwise defined as—

> "A prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt and determining the title to property" (Taylor *vs.* Porter, 4 Hill., 140-1; Dartmouth College *vs.* Woodward, 4th Wheaton, 518, 581).

Again, it is said that it is—

> "An orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights" (State *vs.* Billings, 57 N. W. Rep., 206; Stewart *vs.* Palmer, 74 N. Y., 183-191).
>
> "It is synonymous with 'the law of the land'" (Murray *vs.* Land Co., 18 Howard, 272; Green *vs.* Briggs, 1 Curtiss, 311).

And again:

> "The constitutional provision that no person shall be deprived of life, liberty, or property without due process of law extends to every governmental proceeding which may interfere with personal or property rights, whether the legislation be legislative, judicial or executive, and relating to that class of rights the protection of which is peculiarly within the judicial branch of the government" (Holden *vs.* Harding, 169 U. S., 366; Chicago Ry. Co. *vs.* Minn., 134 U. S., 418; Hagar *vs.* Reclamation District, 111 U. S., 701).
>
> "The same doctrine is laid down in numerous cases, decided by the Supreme Court of various States, arising under the 14th Amendment to the Constitution, and all holding that an enactment of the legislature is not enough of itself to constitute due process of law" (Atlanta *vs.* Central Ry. Co., 53 Ga., 120; Cook *vs.* Commission, 61 Ill., 115; Stewart *vs.* Balto., 7 Ind., 500; Embury *vs.* Connor, 3 N. Y., 511).

The defendants before the Court of Claims laid great stress on the fact that the act of 1906, in question here, was passed and approved *before* the expiration of the five-year limit

fixed in the act of July 1, 1902, against alienation. They seem to think that a condition imposed on the title under the latter act operated to give the United States a right of control of the allotted lands within the period of inalienability. As a matter of law, however, the imposition of these restrictions upon alienation under the act of 1902 vested no interest whatever in the United States, in reversion or otherwise, and did not serve to give the United States any right or control over said lands beyond the period fixed by the act of 1902.

A violation of the condition prohibiting alienation within the time fixed would not in this or any other case redound to the benefit of the United States.

In Schrimpscher *vs.* Stockton, 183 U. S., 290, 299, the court said:

> "Here the United States had issued a patent to Rodgers 'and to his heirs and assigns forever,' subject to a condition, not that the title should revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The Government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not redound to the benefit of the United States or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make."

In Libby *vs.* Clark, 118 U. S., 250, 255, the court said:

> "The title conveyed to Hurr by the patent was a fee simple; that is, it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. The restriction on his right to convey did not deprive the title of the character of a fee simple estate. 'An estate in fee simple is where a man has an estate in lands or tenements to him and his heirs forever' (4 Com. Dig., Estates, 1).

> The limitation on the power of the sale for five years is not inconsistent with a fee simple estate."

The Court of Claims, in support of its decision, declares that if a citizen is:

> "Not competent and *sui juris* to act for himself, the Government, through its proper channel, may act for him to the end that he be protected in his rights of person and property" (R., 35, near bottom).

What does the court mean by the "proper channel?" In this case these words would seem necessarily to refer to the legislative branch of the Government. The court, therefore, would hold that if the legislative branch, at any time, concludes that a citizen of the United States is not competent to act in and about the management of his personal affairs and his private property with the wisdom and prudence that the members of the Legislature deem proper, it is entirely competent for the latter, without judicial inquiry of any kind, to deprive such citizen of the ordinary use and control of his property.

The appellants deny that Congress can designate a particular person of full age, having all the rights and privileges of an American citizen, and lay restrictions upon him and on the use of his property, held by him in fee simple and in his individual right, under the pretense that the legislature is affording him protection. If the Government can do this with the red man why not with the black, and if with the black why not with the white?

If the legislature of one of the States, in which a large number of uneducated colored people reside, should conceive the notion that they were not managing their affairs in the wisest and best way practicable, and for their protection should pass an act laying restrictions upon the sale of their real estate for a period of twenty-five years, would this court hold that it was competent legislation?

Article 14 of the Constitution specifically denies authority to any State to deprive any person of life, liberty, or property without due process of law. In exactly the same manner the 5th Amendment to the Constitution declares, "nor shall any person * * * be deprived of life, liberty, or property without due process of law." This furnishes exactly the same protection against legislation of this character enacted by Congress that the 14th Amendment furnishes against similar legislation enacted by any State legislature.

By sections 38 *et seq.* of the Cherokee Allotment Act of July 1, 1902 (32 Stat., 716, 722), it was provided that certain town sites should be surveyed and the lots sold. Under the statute "any person" could become a purchaser. The full-blood Indians, as citizens of the United States, had a perfect right to, and, no doubt, in numerous instances did, purchase town site property, and took a fee-simple title thereto. Has Congress now the power to pass an act converting the fee-simple title of these full-blood Indians into a life estate? Has it power to restrict in any way the fee-simple title to these lots? If it cannot do this, upon what theory can it convert the fee-simple title to lands taken in allotment into what is practically a life estate?

We confidently assert that as to a citizen of the United States, enjoying all the rights of an American citizen, the legislative branch of the Government cannot lay any special restraints or restrictions on him or his property other than those laid upon all citizens alike, and these can be such only as are permitted by the Constitution; and, with equal confidence, we assert that the courts are in the highest sense bound to protect every citizen against such unconstitutional restrictions attempted to be applied by the legislature to him or his property.

In support of its conclusions, the Court of Claims quotes from Lone Wolf *vs.* Hitchcock, 187 U. S., 553, 565, to the effect that:

> "Plenary authority over the *tribal relations* of the Indians has been exercised by Congress from the

> beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government."

Both from this quotation and from an examination of the case it is manifest that the court in the Lone Wolf case was dealing solely with *tribal* property. The court itself, speaking through Mr. Justice White, says on page 568:

> "The act of June 6, 1900, which is complained of in the bill * * * dealt with the disposition of tribal property. * * * Indeed, the controversy which this case presents is concluded by the decision in Cherokee Nation *vs.* Hitchcock, 187 U. S., 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian *tribal property.*"

We respectfully submit that a case which determines solely the extent of the authority of Congress over tribal property of an Indian Tribe furnishes no basis whatever for a decision that Congress can control the separate property of the individual Indian, a citizen of the United States, held by him in fee simple. This is the distinction which the Court of Claims has entirely overlooked and which appellants urge in this court.

Appellants plant themselves on the decision in Jones *vs.* Meehan, 175 U. S., p. 1. In that case both parties claimed title through a grantee who was a member of an Indian tribe still in tribal relations with the United States. He was not a citizen of the United States, and he took title to his land through a treaty grant.

After reviewing numerous decisions relating to Indian titles by this and other courts, it is said at page 32:

> "The title to the strip of land in controversy, having been granted by the United States to the elder Chief Moose Dung, * * * and having descended * * * to Moose Dung, the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under

that lease could not be divested by any subsequent action of the lessor, or of Congress, or of the executive departments."

Section 2166, United States Revised Statutes, relating to the sale of Indian lands, is confined solely to tribal lands, clearly showing the difference in the control assumed by Congress over lands held by a tribe and those held by an individual Indian in his own right.

Prior to the act of June 30, 1834 (4 Stat., 730), individual Indians were prohibited from selling their lands to others than the United States. By that act they were excluded from such prohibiton, thereby confining the restriction to tribes only, and thus demonstrating that Congress regarded an individual Indian and his property in an entirely different light from a tribe of Indians and tribal property.

Jones *vs.* Meehan, 175 U. S., 1, at p. 12.

While a tribe of Indians can sell and convey their lands to the United States only, an individual Indian has no such limitation and can sell and convey to any purchaser.

Doe *vs.* Wilson, 23 How., 457-463.

VI.

PLENARY POWER OF CONGRESS.

Plenary power of Congress over the tribal relations of Indians does not justify the taking of private property of Indians.

The Court of Claims holds that because plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, therefore Congress can lay the burdens and restrictions complained of herein on any in-

dividual Indian, a member of a tribe, and on his property, whether he be a citizen of the United States or not. Following up this proposition, the court quotes from the case of The Cherokee Nation *vs.* Hitchcock (187 U. S., 294, at 307), as follows:

> "There is no question involved in this case as to the taking of property; the authority which it proposes to exercise by virtue of the act of 1898 has relation merely to the control and development of tribal property; it still remains subject to the administrative control of the Government even though the members of the tribe have been vested with the status of citizenship under recent legislation" (R., 37).

From this decision the Court of Claims draws the conclusion, which, we respectfully submit, is erroneous:

> "That if citizenship may be conferred upon Indians while in tribal relations without affecting the administrative control of their tribal property, it follows that their communal rights in such property are not thereby removed from the control of Congress" (R., 37).

In regard to this we respectfully submit that the case of Cherokee Nation *vs.* Hitchcock, above quoted, bears no resemblance whatever to the case at bar. In that case the court states clearly that no question of the taking of property is involved. In this case the taking of property is directly involved. In that case the acts of Congress in question related merely to the control and development of certain oil property confessedly belonging to the tribe as a whole. In this case the acts in question relate directly to individual property held in fee-simple absolute and held adversely to the tribe. All that is decided in the case of The Cherokee Nation *vs.* Hitchcock is that so long as the property is held by the tribe as tribal property the mere fact of the Indians becoming citizens of the United States does not alter the character of the title, and that the Government, being in control of the

property as trustee must necessarily continue to exercise its powers as such until the property is distributed among the beneficiaries thereof. That proposition, however, has nothing whatever to do with the questions now before the court. The property here involved is not tribal, neither is it communal. It ceased to be tribal when it was selected for allotment by the petitioners and others, in accordance with the act of July 1, 1902, which was accepted and agreed to by a vote of the Cherokees, and also by the 37,560 individuals, members of the Cherokee Nation, who took allotments under the act, and by taking allotments ratified the act in accordance with section 60 thereof. It ceased to be communal property on September 1, 1902, the date fixed by agreement, as of which enrollment should be made.

We again insist that there is a broad and fundamental distinction between Indian tribal property and the individual property of a United States citizen, who happens also to be a member of an Indian tribe.

The conclusion drawn by the court is clearly a *non-sequitur*. It does not follow, as the court holds, that because the grant of citizenship to Indians does not deprive Congress of the power to administer the tribal property held by it in trust, that the rights of the individual to his own property, vested in him in fee simple absolute, can be taken in hand by Congress and administered according to its fancy. The court speaks of "communal rights" in property; we are dealing with individual rights.

The Court of Claims quotes from National Bank of Commerce *vs.* Anderson, 147 Fed. Rep., 87, 90, as follows:

> "The granting of citizenship does not affect the character of the title to land allotted to the Indians, nor is the restriction against alienation inconsistent with citizenship." (Rec., p. 37.)

Considering the second of these propositions first, we say that we do not contend that a restriction against alienation

is inconsistent with citizenship, provided the restriction accompanies the grant. Our contention only goes to the length of asserting that after the grant is made and the title is vested in the grantee, such restrictions cannot subsequently be laid on the property or its use whether the grantee be a citizen or not.

As to the first of these propositions we do not contend that the granting of citizenship affects the character of the title to land allotted to the Indians. Our contention is, that the granting of tribal land in severalty and in fee simple to individual Indians, does alter the title; and that although Congress may control the use of such lands so long as they continue tribal property, it cannot attach new conditions to a grant made to the individual Indian after the title has passed to and vested in him.

In Pennock *vs.* Commissioners (103 U. S., 44), involving the right of an Indian allottee, to whom certain lands had been patented, the court says (p. 48):

> "When the patent of the Government is once issued for the lands, all restrictions upon their alienation, not expressly named, are gone. Without such designation, inability to alienate the property would be inconsistent with the perfect title which accompanies the patent."

In Lykens *vs.* McGrath (184 U. S., 171), which involved Indian title to land, the court said (p. 171):

> "Title passed to him (Indian) by the patent, and but for the restriction he would have had the full power of alienation, the same as any holder of a fee simple title."

Murray *vs.* Walder (17 Wendell, 537-9) holds that any prohibition against alienation of lands by Indians contained in the Constitution of the United States and acts of Congress do not apply to the case of an individual Indian making contracts, or at all events not to sales of bounty lands granted

to individual Indians by the State, and that it should be confined to lands held in common by the tribes.

> "The construction of treaties is the peculiar province of the judiciary, and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself."
>
> Wilson *vs.* Wall, 6 Wall., 83, 89.
> Reichart *vs.* Felps, 6 Wall., 160.
> Smith *vs.* Stevens, 10 Wall., 321, 327.
> Holden *vs.* Joy, 17 Wall., 211, 247.

It has been distinctly decided that:

> "An Indian who is a citizen has the same rights and privileges as any other citizen."
>
> U. S. *vs.* Ritchie, 17 Howard, 525, 539, 540.

The court quotes from the act of Congress admitting the State of Oklahoma to the Union. It will be noted that Congress simply reserves to itself the power to make treaties, agreements or laws "which it would have been competent to make if this act had never been passed." As Congress had no authority to pass the acts in question prior to the Enabling Act referred to, it certainly had none after. (Rec., p. 37.)

VII.

VALIDITY—NOT DESIRABILITY OR BENEFICENCE.

The issue herein is not the desirability or beneficence of the acts in question, but their validity.

The Court of Claims has found as a fact (R., 38) that the full-blood Indians to whom allotments have been made are "in the main" in favor of the restrictions placed upon their lands by the acts of Congress in question.

The Court does not find that either William Brown or Levi B. Gritts is now, or ever has been, in favor of, or that either has ever assented in any way whatsoever to, these new restrictions on them and their property; nor is it claimed that these acts are, or can be, of any benefit whatsoever to them. William Brown and Levi B. Gritts are the parties to this suit, and the court finds that they are "the identical persons named in the Jurisdictional Act" (R., 26, Finding XI).

Is it possible that the constitutional right of these two petitioners to control and enjoy their own individual property can be taken from them, even if it be a fact that other full-bloods are, "in the main," in favor of additional restrictions on their property, or think that such restrictions would be beneficial to the owners?

Against this Finding of Fact, however, we respectfully, but most earnestly protest, because it is not pretended by any one that the 30,000 persons affected by these acts have ever, at any time, been consulted about them; they have in no way whatsoever expressed any preference for or against them; they have not voted on them, as they did on the Act of July 1, 1902. The Court holds that perhaps 30,000 persons are affected by these acts (R., 30), and in Finding XVI (R., 28), it is held that 25,338 transactions relating to the lands of these full-blood Indians, either by deed, contracts to sell or mortgage appear upon the records of the State of Oklahoma. It may be that after these 25,338 persons who constitute the "main part" of the total of 30,000, have sold their lands, or contracted to sell or mortgage them, and received the money on such contracts, they would be in favor of any act of Congress which would give them control of their property for twenty-five years longer, with the hope that another twenty-five years would be added, so that they would enjoy both the money derived from the sale of the lands and the lands themselves.

The Court of Claims also declares in its opinion, though it

does not find it as a fact, that these acts are beneficent in their purpose, and makes this the basis, in part, of its judgment. It must have overlooked the case of The Cherokee Nation *vs.* Hitchcock (187 U. S., 294, at 308), in which this court said:

> "We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees."

Whatever may have been the purpose of the act, no claim can be made that it has been in fact beneficial to the Indians, because, first, no proof is offered and no finding is made that the act has been, in fact, a protection to the full-bloods; second, the court itself declares in Finding XVI (R., 28):

> "Since the passage of the act of April 26, 1906, *supra,* large numbers of such deeds, contracts to sell, and mortgages of their allotted lands in violation of said last-mentioned act, are being filed almost daily in the offices of the recorder of deeds of the counties of Oklahoma where the said lands are situated; and suits have been brought by the United States embracing 25,338 transactions in the United States courts of the State of Oklahoma to cancel said deeds, contracts and mortgages, upon the ground that they are a cloud upon the title of such Indians to their allotment."

Instead, therefore, of the act of April 26, 1906, being a shield and a protection, the court finds as a matter of fact that deeds, mortgages and contracts of sale for these allotted lands have been executed and recorded in large numbers since the passage of the act, the only effect of which must be that the Indians, instead of securing a fair price for their lands, are compelled to suffer a heavy discount because of this ill-advised legislation casting a cloud upon their title.

The full-blood Indians, with all other classes, selected

their individual allotments, and by so doing they surrendered their right and interest in every other allotment as provided in section 60 of the act of July 1, 1902. This constituted a valuable consideration given by each of the full-bloods for their allotments.

Notwithstanding, however, that all the classes of allottees took exactly the same kind of title and surrendered the same valuable consideration, it is now said that it is competent for Congress to select one of these classes and deny its members the free enjoyment and use of their allotments, under the claim that they are in need of protection. On this point Mr. Justice Howry, filing the dissenting opinion (R., 42), says:

> "But when the land was granted the character of the title alloted to the complainants and other full-bloods was the same as if allotted to other citizens. The title of the one became as unqualified as the title of the other, and any attempt to differentiate between the fees so held can only be sustained upon the theory that the Indian can never acquire such a right to land as the Government is bound to respect. * * * The attempt to set aside settled titles thus acquired is in violation of what the Supreme Court declared in Choctaw Nation, 119 U. S., 29, and again in U. S. *vs.* Old Settlers, 148 U. S., 473, that: 'Where, in professed pursuance of treaties, statutes have conferred valuable benefits upon Indians, which the latter have accepted, they partake of the nature of agreements—the acceptance of the benefit, coupled with the condition, implying an assent on the part of the recipient to the condition.'"

And he says (R., 41, 42):

> "But with fixed ideas as to the meaning of a grant and because no case (out of at least one hundred discussed) has been cited which sustains the proposition that land once granted can be seized and controlled by the Government except in the exercise of the right of eminent domain, I am unable to accept the Government's contention that the acts of Congress which attempt to do so are valid."

And further says (R., 47):

> "The title could not vest and yet be subject to the control of the grantor. If it could, there was no investiture. This court is in entire harmony, however, that the title did vest. When it did there was nothing left for new legislation to operate upon as to the lands which had passed out of the control of the Government. As well might it be said if money had been distributed and annuities had been paid, that subsequent legislation might provide for recovery as to say that a supplemental enactment could operate upon the title to land given absolutely to the individual."

That the operation of the act of April 26, 1906, is not beneficial but highly injurious to the Indians is made manifest by the report of the Select Committee of the Senate, being report No. 5013, 59th Cong., 2d Sess. This committee, consisting of Senators C. D. Clark, chairman of the Senate Judiciary Committee; Chester I. Long, Frank B. Brandegee, H. M. Teller, and W. A. Clark, was appointed under a resolution of the Senate of June 30, 1906—

> "To fully investigate all matters connected with the condition of affairs in the Indian Territory in relation to legislation included in the act entitled 'An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' approved April 26, 1906, and kindred matters in said Territory with reference to the Five Civilized Tribes."

The committee was directed to make full and complete report, together with their conclusions and recommendations, to the Senate of the United States. They began taking testimony November 12, 1906, held sittings at numerous points in the Indian Territory, and submitted their report to the Senate, together with more than 2,000 pages of printed testimony. Instead of examining a few witnesses,

specially selected, the committee reports that "these meetings were open and free and the public was fully advised as to the date and invited to be present and give to the committee such information as might be available and offer such suggestions as might be deemed proper by the persons appearing. Special effort, and with marked success, was made to have the Indians, both those of the full blood and those of the mixed blood, fully represented." The committee further reports that amongst the questions of greatest concern considered by them was

> "The question of the restrictions upon the alienation of lands taken in allotment by the individuals of each of the Civilized Tribes."

They further say:

> "In all its inquiry and deliberations, the committee has been much embarrassed by the former legislation by Congress as to the legal status of the members of the Five Civilized Tribes. By definite and express act of Congress, March 3, 1901, each member of these tribes was made a citizen of the United States, and as such, under the Constitution, and under the terms of said law, entitled to all the rights, privileges, and immunities of every other citizen of the United States. Yet, notwithstanding this express legislative naturalization, Congress, in its subsequent legislation, and the Department of the Interior, acting under such legislation, has apparently ignored entirely this established citizenship, and in nearly every instance has treated the questions arising within the Five Civilized Tribes as though no such acts had ever been passed and as though the Indians were still in the broadest sense the wards of the Government. In other words, it appears that since the passage of the act above referred to, the Congress of the United States and the Department of the Interior have proceeded in dealing with Indian Territory affairs along the same lines as were followed before said act was passed."

As to the removal or restrictions, the committee say (Page V):

> "By the supplemental agreements made in 1902 these Indians agreed to take their lands in severalty *upon condition* that they could alienate their allotments within a certain period, which differed in the different tribes."

By the act of April 26, 1906, section 19, it is provided that no full-blood Indian shall have power to alienate, sell, dispose of, or encumber lands allotted to him for a period of twenty-five years from the approval of said act. As to this provision, the committee say:

> "We believe that this last legislation was unwise, injurious to the Indians, and of no validity. Congress, after providing in the supplemental agreements that all the lands allotted to the citizens of the different tribes should be alienable within certain periods, could not, without the consent of the Indians, extend the time in which the lands could not be alienated and add to the restrictions imposed by the original agreements. The effect of this legislation has already clouded, and, if unrepealed, will continue to cloud the title of much land in Indian Territory, and will result in endless litigation.
>
> "It will prevent the Indians from obtaining a fair price for their lands, and has been, and will continue to be, a fruitful source of dishonest transactions.
>
> "It will not prevent sales being made at the expiration of the periods designated in the supplemental agreements, and has already resulted in contracts being made for such sales. This provision is generally considered to be invalid and should be repealed."

This court is empowered to consider a public document of this character, although not embraced in the findings of the Court of Claims (New York Indians *vs.* U. S., 170 U. S., 1, at p. 32).

CONCLUSION.

In conclusion, we respectfully submit that the Court of Claims has failed to recognize that these appellants, as citizens of the United States, are entitled to the protection of the Constitution; that the property involved is individual and not tribal; that the principles of law applicable to Indian tribal property are not applicable to individual Indian property; that the law which protects the vested rights of property owners is applicable to these appellants, although they are Indians by blood, and that Congress was without power to add conditions to the title or restrictions on the individual's control of his property in this case, and that to do so would amount to the taking of property without due process of law. Therefore the court erred in dismissing the petition.

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APPENDIX A.

Cherokee Allotment Act, July 1, 1902.

[32 Statutes at Large, 716.]

An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of the town sites therein, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DEFINITION OF WORDS EMPLOYED HEREIN.

SEC. 4. The word "minor" shall be held to mean males under the age of twenty-one years and females under the age of eighteen years.

SEC. 5. The terms "allottable lands" or "lands allottable" shall be held to mean all the lands of the Cherokee tribe not herein reserved from allotment.

SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

SEC. 12. For the purpose of making allotments and designating homesteads hereunder, the forty-acre, or quarter of a quarter section, subdivision established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the

average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

SEC. 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said Commission to make said selection and designation.

SEC. 17. In the making of allotments and in the designation of homesteads for members of said tribe, said Commission shall not be required to divide lands into tracts of less than the smallest legal subdivision provided for in section twelve hereof.

SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided,* That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

SEC. 21. Allotment certificates issued by the Dawes Com-

mission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

SEC. 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands. . . .

RESERVATIONS.

SEC. 24. The following lands shall be reserved from the allotment of lands herein provided for:

(a) All lands set apart for town sites by the provisions of the act of Congress of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), the provisions of the act of Congress of May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), and by the provisions of this act.

(b) All lands to which, upon the date of the ratification of this act, any railroad company may, under any treaty or act of Congress, have a vested right for right of way, depots, station grounds, water stations, stock yards, or similar uses only, connected with the maintenance and operation of the railroad.

(c) All lands selected for town cemeteries not to exceed twenty acres each.

(d) One acre of land for each Cherokee schoolhouse not included in town sites or herein otherwise provided for.

(e) Four acres for Willie Halsell College at Vinita.

(f) Four acres for Baptist Mission school at Tahlequah.

(g) Four acres for Presbyterian school at Tahlequah.

(h) Four acres for Park Hill Mission school south of Tahlequah.

(i) Four acres for Elm Spring Mission school at Barren Fork.

(j) Four acres for Dwight Mission school at Sallisaw.

(k) Four acres for Shiatook Mission, near Skiatook.

(l) Four acres for Lutheran Mission school on Illinois River north of Tahlequah.

(m) Sufficient ground for burial purposes where neighborhood cemeteries are now located, not to exceed three acres each.

(n) One acre for each church house outside of towns.

(o) The square now occupied by the capitol building at Tahlequah.

(p) The grounds now occupied by the national jail at Tahlequah.

(q) The grounds now occupied by the Cherokee Advocate printing office at Tahlequah.

(r) Forty acres for the Cherokee Male Seminary near Tahlequah.

(s) Forty acres for the Cherokee Female Seminary at Tahlequah.

(t) One hundred and twenty acres for the Cherokee Orphan Asylum on Grand River.

(u) Forty acres for colored high school in Tahlequah district.

(v) Forty acres for the Cherokee Insane Asylum.

(w) Four acres for the school for blind, deaf, and dumb children near Fort Gibson.

The acre so reserved for any church or school-house in any quarter section of land shall be located where practicable in a corner of such quarter section adjacent to the section lines thereof.

ROLL OF CITIZENSHIP.

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: *Provided,* That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal prop-

erty shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of any one on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

TITLES.

SEC. 58. The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title, and interest, of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate.

SEC. 59. All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent.

SEC. 60. Any allottee accepting such patent shall be deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in this act, and to relinquish all his right, title, and interest to the same, except in the proceeds of lands reserved from allotment.

SEC. 61. The acceptance of patents for minors and incompetents by persons authorized to select their allotments for them shall be deemed sufficient to bind such minors and incompetents as to the conveyance of all other lands of the tribe.

SEC. 62. All patents, when so executed and approved, shall be filed in the office of the Dawes Commission, and recorded in a book provided for the purpose, until such time

as Congress shall make other suitable provision for record of land titles, without expense to the grantee, and such records shall have like effect as other public records.

MISCELLANEOUS.

SEC. 63. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

SEC. 64. The collection of all revenues of whatsoever character belonging to the tribe shall be made by an officer appointed by the Secretary of the Interior, under rules and regulations to be prescribed by the said Secretary.

SEC. 65. All things necessary to carry into effect the provisions of this act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior.

SEC. 66. All funds of the tribe, and all moneys accruing under the provisions of this act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior.

SEC. 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable and he shall make all needed rules and regulations to carry this provision into effect.

SEC. 69. After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee tribe as provided in this act, no contest shall be instituted against such selection, and as early thereafter as practicable patent shall issue therefor.

SEC. 70. Allotments may be selected and homesteads designated for minors by the father or mother, if citizens, or by a

guardian, or curator, or the administrator having charge of their estate, in the order named; and for prisoners, convicts, aged and infirm persons, and soldiers and sailors of the United States on duty outside of the Indian Territory, by duly appointed agents under power of attorney; and for incompetents by guardians, curators, or other suitable persons akin to them; but it shall be the duty of said Commission to see that said selections are made for the best interests of such parties.

SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands.

SEC. 73. The provisions of section thirteen of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall not apply to or in any manner affect the lands or other property of said tribe, and no act of Congress or treaty provision inconsistent with this agreement shall be in force in said nation except sections fourteen and twenty-seven of said last-mentioned act, which shall continue in force as if this agreement had not been made.

SEC. 74. This act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following:

SEC. 75. The principal chief shall, within ten days after the passage of this act by Congress, make public proclamation that the same shall be voted upon at a special election to be held for that purpose within thirty days thereafter, on a certain date therein named, and he shall appoint such officers and make such other provisions as may be necessary for holding such election. The votes cast at such election shall be forthwith duly certified as required by Cherokee law, and the votes shall be counted by the Cherokee national council, if then in session, and if not in session the principal chief shall convene an extraordinary session for the purpose, in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief shall jointly make certificate thereof and proclamation of the result and transmit the same to the President of the United States.

Approved by President, July 1, 1902.

Ratified by Cherokee people, August 7, 1902.

Proclaimed by Tams Bixby, acting chairman Commission to the Five Civilized Tribes, and T. M. Buffington, Principal Chief, Cherokee Nation, August 12, 1902.

APPENDIX B.

The Jurisdictional Act, March 1, 1907.

[34 Stat. L., 1015.]

That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled "An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or

any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine and adjudicate each of said suits.

The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.

Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of the said acts, authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two.

APPENDIX C.

Act of March 11, 1904.

[33 Stat., 65.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any

Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided*, That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company: *Provided further*, That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements cannot be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction

therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe lines, and then only so far as may be necessary for its construction, maintenance, and care: *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper.

SEC. 2. The right to alter, amend, or repeal this act is expressly reserved.

APPENDIX D.

Act of April 26, 1906.

[34 Stat., 137.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That after the approval of this act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of this act, in which cases such motion shall be made within sixty days after the passage of this act: *Provided*, That the Secretary of the Interior may enroll persons whose names appear upon any of the tribal rolls and for whom the records in charge of the Commissioner to the Five Civilized Tribes show application was

made prior to December first, nineteen hundred and five, and which was not allowed solely because not made within the time prescribed by law.

SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and reënacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this act as to allotments heretofore made, no contest shall be instituted against such allotment: *Provided*, That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided*, That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States.

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period,

be removed by the act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal or restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

SEC. 20. That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided,* That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

SEC. 21. That if any allottee of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes die intestate without widow, heir or heirs, or surviving spouse, seized of all or any

portion of his allotment prior to the final distribution of the tribal property, and such fact shall be known by the Secretary of the Interior, the lands allotted to him shall revert to the tribe and be disposed of as herein provided for surplus lands; but if the death of such allottee be not known by the Secretary of the Interior before final distribution of the tribal property, the land shall escheat to and vest in such State or Territory as may be formed to include said lands. That heirs of deceased Mississippi Choctaws who died before making proof of removal to and settlement in the Choctaw country and within the period prescribed by law for making such proof may within sixty days from the passage of this act appear before the Commissioner to the Five Civilized Tribes and make such proof as would be required if made by such deceased Mississippi Choctaws; and the decision of the Commissioner to the Five Civilized Tribes shall be final therein, and no appeal therefrom shall be allowed.

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

SEC. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner.

SEC. 25. That any light or power company doing business within the limits of the Indian Territory, in compliance with the laws of the United States that are now or may be in force therein, be, and the same are hereby, invested and empowered with the right of locating, constructing, owning, operating, using, and maintaining canals, reservoirs, auxiliary steam works, and a dam or dams across any nonnavigable stream within the limits of said Indian Territory, for the purpose of obtaining a sufficient supply of water to manufacture and generate water, electric, or other power, light, and heat and to utilize and transmit and distribute such power, light, and heat to other places for its own use or other individuals or corporations, and the right of locating, constructing, owning, operating, equipping, using, and maintaining the necessary pole lines and conduits for the purpose of transmitting and distributing such power, light, and heat to other places within the limits of said Indian Territory.

That the right to locate, construct, own, operate, use, and maintain such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through the Indian Territory, together with the right to acquire, by condemnation, purchase or agreement between the parties, such land as it may deem necessary for the locating, constructing, owning, operating, using, and maintaining of such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through any land held by any Indian tribe or nation, person, individual, corporation, or municipality in said Indian Territory, or in or through any lands in said Indian Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any company complying with the provisions of this act: *Provided*, That the purchase from and agreements with individual Indians, where the right of alienation has not theretofore been granted by law, shall be subject to approval by the Secretary of the Interior.

In case of the failure of any light or power company to make amicable settlement with any individual owner, occupant, allottee, tribe, nation, corporation, or municipality for any lands or improvements sought to be condemned or appropriated under this act all compensation and damages to be

paid to the dissenting individual owner, occupant, allottee, tribe, nation, corporation, or municipality by reason of the appropriation and condemnation of said lands and improvements shall be determined as provided in sections fifteen and seventeen of an act of Congress entitled "An act to grant a right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (public, numbered twenty-six), and all such proceedings hereunder shall conform to said sections, except that sections three and four of said act shall have no application, and except that hereafter the plats required to be filed by said act shall be filed with the Secretary of the Interior and with the Commissioner to the Five Civilized Tribes, and where the words "Principal Chief or Governor" of any tribe or nation occur in said act, for the purpose of this act there is inserted the words Commissioner to the Five Civilized Tribes. Whenever any such dam or dams, canals, reservoirs, and auxiliary steam works, pole lines and conduits are to be constructed within the limits of any incorporated city or town in the Indian Territory, the municipal authorities of such city or town shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such cities and towns: *Provided,* That all rights granted hereunder shall be subject to the control of the future Territory or State within which the Indian Territory may be situated.

APPENDIX E.

Act of June 21, 1906.

[34 Stat. L., 321.]

That section two of the act entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, be, and the same is hereby, amended by striking out thereof the words "*Provided further,* That nothing herein shall be

construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided further,* That nothing herein shall apply to the intermarried whites in the Cherokee Nation whose cases are now pending in the Supreme Court of the United States." And insert in said act in lieu of the matter repealed, the following: *Provided further,* That nothing herein shall be construed so as hereafter to permit any person to file an application for enrollment or to be entitled to enrollment in any of said tribes, except for minors the children of Indians by blood, or of freedmen members of said tribes, or of Mississippi Choctaws identified under the fourteenth article of the treaty of eighteen hundred and thirty, as herein otherwise provided, and the fact that the name of a person appears on the tribal roll of any of said tribes shall not be construed to be an application for enrollment.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 331.

WILLIAM BROWN AND LEVI B. GRITTS ET AL.,
APPELLANTS,

vs.

THE UNITED STATES.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF STATE OF OKLAHOMA.

Comes now Charles West, Attorney General of the State of Oklahoma, and in pursuance of leave of court heretofore granted on November 29, files this brief on behalf of the State of Oklahoma.

The State of Oklahoma is interested in the determination of the above-entitled cause for the reason that the determination of the same will materially affect the revenues of the State, in that there are 26,748 full-blood Indians, owning 5,371,905 acres of land, worth approximately $10 per acre, and aggregating over fifty millions of dollars, which property will either go on or off the tax schedules of Oklahoma, at the

period of alienation or taxability as determined in this case. A letter from Hon. R. G. Valentine, Commissioner of Indian Affairs, showing the full-blood population of the Five Civilized Tribes and the total area of lands allotted to full-bloods, is hereto attached and marked "Exhibit A." If the act of April 26, 1906, extending the restrictions (sections 19, 20, 22), the McCumber amendment, is held invalid this property will go on the tax schedules after the expiration of the period of restrictions fixed by the original agreements of the five tribes. Otherwise this property may not go on the tax schedules until August 7, 1931, or until the restrictions are otherwise removed under the law, or by the judgment of the courts.

Statement of the Case.

Brown and Gritts are citizens of the State of Oklahoma, and were made citizens of the United States by the act of March 3, 1901 (24 Stats., 390, and 31 Stats., 1447, chap. 868). By race, however, they happen to be Cherokees of pure Indian blood, commonly called full-bloods.

After they had been made citizens of the United States in 1901, Congress passed an act on July 1, 1902 (32 Stats., 716), proposing the allotment of the lands and distribution of property owned by them by communal title. The act of July 1, 1902, was substantially the same as an agreement which had been drawn up and submitted to the Cherokee people in 1901, and by popular vote rejected.

This act proposed that the United States should be authorized by the vote of the owners of the property to distribute the property as of September 1, 1902, giving each citizen then living 110 acres of average allottable land and paying to each citizen then living his distributive share of the other property owned by them.

This act was not to be valid (could not have been valid) unless ratified by a majority of the owners of the communal property (sections 74 and 75.).

The communal title ended by this agreement (sections 20, 25, 26, and 31), and became an individualized title as to the allotments and a title in common owned by those citizens living September 1, 1902, and none others. The statute was ratified providing that the property should be distributed to those citizens of the Cherokee Nation entitled to enrollment and living on the first day of September, 1902, and none others (section 31), and expressly providing that any person born thereafter, the child of a Cherokee citizen, should *not be enrolled* or participate in the distribution of the tribal property (section 26), and that the distributive share of any enrolled citizen living September 1, 1902, shall descend to his heirs, if he die (section 20). (32 Stats., 718.)

The communal title ended therefore on September 1, 1902, and the title to the former tribal property became *a title in common,* owned by 37,561 citizens of the United States, and the proceeds of which was to be distributed to them by the United States as an agency (sections 31, 67, 65.)

The Cherokee people, as a community, had received the title to this land in fee simple by the treaty of 1828, and had never parted with the title or any part of it.

The Cherokee people were therefore collectively the grantors of the individual allotments to themselves severally, and imposed the restrictions against alienation, as such grantors, upon themselves as individual grantees, and the United States was not the grantor of the individual allotments and imposed no restrictions as grantor, and had no power in any other capacity (not being guardian) to impose restrictions against alienation on the lands so acquired and owned by these citizens of the United States (Jones *vs.* Meehan, 175 U. S., 1).

The statute agreement provided that the allotment certificates issued by the Dawes commission should be *conclusive evidence of the right of an allottee to the tract of land described therein* (section 21). Brown and Gritts received a

fee-simple title to such allotted lands. The Court of Claims held (Record, 29, conclusions of law, paragraph 5) that:

> "The issuance of allotment certificates and allotment deeds, in conformity with the provisions of said act of July 1, 1902, to individual Cherokee allottees, including the petitioners, vested in them the fee-simple title to the lands described in said allotment certificates and allotment deeds respectively."

The Cherokee people, as grantors of the title, in ratifying the act of July 1, 1902, and *not* the United States, imposed the following conditions upon the land, restricting alienation, to wit (sections 13, 14, 15, 32 Stats., 717):

> "Each member of said tribe shall, at the time of the selection of his allotment, designate as *a homestead* out of said allotment land equal in value to *forty acres* of the average allotable lands of the Cherokee Nation, as nearly as may be, which shall be *inalienable during the lifetime of the allottee, not exceeding twenty-one years* from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be *non-taxable*, and shall not be liable for any debt contracted by the owner thereof while so held by him.
>
> "*Lands allotted to citizens shall not* in any manner whatever, or at any time, be encumbered, taken, or sold to secure or satisfy any debt or obligation, or *be alienated* by the allottee or his heirs, before the expiration of *five years from the date of the ratification of this act.*
>
> "All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in *five years after issuance of patent.*"

A 40-acre homestead was thus inalienable and declared *non-taxable* during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment, and other allotted lands could not be alienated for five years

from the date of the ratification of the act. All surplus allotted land was thus subject to taxation within the boundaries of the late Cherokee Nation after August 7, 1907, and when Oklahoma was admited to the Union, November 16, 1907.

On April 26, 1906, Congress passed an act (34 Stats., 137) providing that *"no full-blood Indian"* of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes *"shall have power to alienate, sell, dispose of* or encumber in any manner any of the lands allotted to him for a period of twenty-five years, etc.," unless such restriction shall, prior to expiration of said period, be removed by act of Congress (section 19.)

Other minor disabilities were proposed in this act to be imposed upon persons of the pure Indian blood belonging to the late Five Civilized Tribes.

On May 27, 1908, after the State of Oklahoma had entered the Union, Congress passed an act entitled "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," providing as follows:

> "CHAP. 199. An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes.
>
> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after sixty days from the date of this act *the status of the lands allotted heretofore or hereafter* to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, except homesteads, of said allottees enrolled as mixed-blood Indians, having half or more than half and less than three-quarters Indian blood, shall be free from all restrictions. *All homesteads of said allottees enrolled as mixed-blood Indians, having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more*

> *Indian blood, including minors of such degrees of blood, shall not be subject to alienation*, contract to sell, power of attorney, or any other incumbrance *prior to April twenty-sixth, nineteen hundred and thirty-one*, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe" (35 Stats., 312).

Here Congress, under the title of "An act for the removal of restrictions," has attempted to impose additional restrictions on the period of alienation of lands of citizens who are of half or more Indian blood, while it provides that the Secretary of the Interior may remove the restrictions, wholly or in part, of lands of persons of half or more Indian blood, and impose rules on the "disposal of the *proceeds*" thereof.

The "proceeds" of these lands were not subjected to the control of the Interior Department by any previous act.

It is obvious that these two latter statutes are based on the theory that the allottees of the Five Civilized Tribes are still wards and aliens, subject to the supervisory control of the United States in regard to the alienation of their lands, even after such persons have been made full citizens of the United States and after such persons have become full citizens of the sovereign State of Oklahoma.

If this contention be true and Congress can declare that these citizens shall not "have power" to sell their property and can fix the status of the lands allotted and previously conveyed in fee simple so as to inhibit the sale, alienation or encumbrance prior to April 26, 1931, it may exercise such authority permanently and prevent these lands from being taxable at any time by the State of Oklahoma, and may at any future time interfere with the personal rights of these citizens of Oklahoma and deprive them of constitutional guaranteed immunities.

Section 4 of this act provides:

> *"That all land from which restrictions have been or shall be removed shall be subject to taxation* and all other civil burdens *as though it were the property of other persons than allottees* of the Five Civilized Tribes",

thus raising the implication that the lands *shall not* be taxable as long as Congress chooses to extend restrictions, and that the citizen allottees have not the same personal rights under the constitution and laws as other citizens of Oklahoma.

For brevity's sake we omit all minor matters and in this brief shall confine ourselves to the inquiry as to the validity of the McCumber amendment, which declares that, "no full-blood Indian of the" * * * "Cherokee" * * * "Tribe *shall have power* to alienate lands allotted to him for a period of twenty-five years" from the approval of the act.

ARGUMENT.

If Congress could forbid Brown and Gritts to alienate land held by them in fee simple, it must be:

First, either because the United States had control over them personally as "wards" or,

Second, because the United States, as grantor of the land could attach valid conditions to the title of the land forbidding alienation.

The United States no Capacity as Grantor of Title.

No contention is made or could be made that the United States is grantor of the land or as grantor could impose conditions upon alienation. The United States had parted with all title to these lands in 1828. The land was owned *by the whole Cherokee people* (art. 1, treaty 1846), who became the

grantors under the act of July 1, 1902, and, as grantors, imposed certain limited restrictions against alienation, to wit: 21 years on the homestead allotment and five years on the surplus allotment. The Cherokee people deemed this abundant protection. The probate courts in existence in Indian Territory under the control of the United States court provided adequate protection for all defective citizens, including incompetents, and this provision, that the allottee should have a title of which he might not divest himself for 21 years as to the homestead and for five years as to the surplus, was deemed sufficient both by the Cherokees and by the Congress of the United States. The Cherokee people, as grantors, had a right to impose these conditions upon Brown and Gritts, and when Brown and Gritts accepted the title with these conditions they could not divest themselves of the title to their homesteads for 21 years nor of the surplus for five years.

(Schrimsher *vs.* Stockton, 183 U. S., 290.)

The United States Circuit Court of Appeals for the Eighth Circuit in the Allen cases decided, June 8, 1910, in speaking of the right of the United States, conceded that the United States had no legal or equitable estate in the Cherokee allotted lands in the following language:

> "It will be conceded at the outset that it has no legal or equitable estate in the allotments; and if such is necessary it has no standing in court" (United States *vs.* Allen, 179 Fed. Rep., 13, at page 16, last paragraph).

The court also said (page 15), in regard to these suits referred to by the Court of Claims as involving 25,338 transactions that,

> "The allottees are not made parties either as plaintiff or defendant, and it is not charged in the bills that the conveyances were obtained by fraud, misrepresentation, or for an inadequate consideration.

> They are assailed solely upon the ground that they were made in violation of the restrictions which Congress imposed upon the alienation of the allotments."

Notwithstanding the fact that the United States was not the grantor of the allotment and had no legal or equitable estate in the allotment various authorities have been gravely cited by the Court of Claims and counsel for the United States, in which the United States was grantor and trustee of the title, to illustrate the point that the United States had exercised authority over "Indian lands" after the "Indians" had become citizens of the United States. For example, the case of the United States *vs.* Rickert, 188 U. S., 433, in which the United States was grantor and trustee of the title for 25 years for the sole use of the allottee and therefore had a right to defend such land against taxation. Of like purport are the cases of Beck *vs.* Flournoy Live Stock and Realty Co., 71 Fed., 576. In these cases the United States was grantor and trustee of the title. Of like purport are the cases of the National Bank of Commerce *vs.* Anderson, 147 Fed., 87, the United States *vs.* Thurston County, 143 Fed., 287, where the United States held the proceeds of trust lands subject to a like trust. The case of The United States *vs.* Dooley, 151 Fed., 697, likewise was a case where the United States was holder of a title in trust. None of these cases justifies any interference with or assertion of right over the title to land where the United States was not grantor and was not a trustee.

It appears to be obvious that since the United States was not grantor of the land to Brown and Gritts and was not trustee of the title and had no legal or equitable estate in such allotments, it could not attach conditions to the allotments in the capacity of grantor or exercise any right as trustee of the title.

THE UNITED STATES NO CAPACITY AS GUARDIAN.

The only remaining basis upon which it may be assumed that the United States had a right to *forbid* Brown and Gritts to alienate land held by them in fee simple is the power of guardianship asserted by Government counsel.

The United States was not a guardian of Brown and Gritts on April 26, 1906, and had no right to assume the power of guardianship over them on that date.

The Constitution of the United States authorizes Congress to regulate commerce with Indian tribes, and the courts have held that the Indian people, *prior* to the grant of citizenship, were domestic, dependent "aliens," "in a state of pupilage" "owing no allegiance to the State, and receiving no protection from the State," and that "the duty of protecting the Indians carries with it the power to protect."

Cherokee Nation *vs.* Georgia, 5 Peters, 1.
Worcester *vs.* Georgia, 6 Peters, 512.
Elk *vs.* Wilkins, 112 U. S., 94 (Nov. 3, 1884).
U. S. *vs.* Kagama, 118 U. S., 375.
Stevens *vs.* Cherokee Nation, 174 U. S., 477.
Lone Wolf *vs.* Hitchcock, 187 U. S., 553.
Cherokee Nation *vs.* Hitchcock, 187 U. S., 294.

After the case of Elk *vs.* Wilkins was decided, in 1884, Congress, in 1887, passed the Dawes allotment act, by which any Indian taking up his residence *separate and apart* from the tribe should have full citizenship of the United States.

All of those cases above cited deal with the Indian people **prior to the grant of citizenship;** deal with them at a time when they were not citizens of the United States, but occupying the legal status of Indians, as aliens, wards, dependents, owing no allegiance to the States nor to the United States.

The last case of the Cherokee Nation *vs.* Hitchcock arose over the question of the validity of a provision of the act of June 28, 1898, authorizing the Secretary of the Interior to

make leases of certain oil lands of the Cherokee people, and was held to be a valid exercise of power, the property being tribal property at the time (1898) and the Cherokees not having been then declared citizens of the United States.

None of the cases referred to *supra* have any persuasive force in establishing the right of the United States to assert guardianship over citizens of the United States. They constitute no precedent warranting the interference with the title held by private persons in fee simple who, though of Indian blood, have become citizens of the United States, because they all relate to Indians, PRIOR TO THE GRANT OF CITIZENSHIP, while such Indians were still dependent ALIENS.

The attorneys representing the United States and the Secretary of the Interior in these suits attempt to break the force of the grant of citizenship, first, *by precedents,* and second, by argument from the statutes.

1st. The precedents quoted to sustain the theory of guardianship are as above cited. Cherokee Nation *vs.* Georgia, 5 Peters, 1; Worcester *vs.* Georgia, 6 Peters, 512; U. S. *vs.* Kagama, 118 U. S., 375; Stevens *vs.* Cherokee Nation, 174 U. S., 477; Lonewolf *vs.* Hitchcock, 187 U. S., 553; Cherokee Nation *vs.* Hitchcock, 187 U. S., 294.

In every one of these cases the questions passed upon arose prior to 1901 and prior to the full grant, recognition, or assertion of United States citizenship, and were based upon the uncontradicted theory that *the Indians had not been granted the right of citizenship.* These cases are, therefore, not in point and have no persuasive force.

2d. It is contended by Government counsel that the joint resolution of March 2, 1906, and section 28 of the act of April 26, 1906, extended the tribal existence and the tribal governments after March 4, 1906, and by these acts the Congress, notwithstanding the previous grant of citizenship, treated them as "tribal Indians," and the Court of Claims says: "By these acts the Government asserted its continued guardianship" (Rec., Muskrat Case, 330, p. 32, § 3).

This contention could not be maintained (even if Congress had had any such purpose, which it most emphatically had not) under the decision of the Supreme Court of the United States in *In re* Heff, 197 U. S., 488, in which the court said:

> "We are of the opinion that *when the United States grants the privileges of citizenship to an Indian,* gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; *that the emancipation from Federal control, thus created, cannot be set aside at the instance of the Government without the consent of the individual Indian and the State*" (pp. 509).

The court also said in this case that the argument made by the Solicitor General in the Heff case was unsound in the implication:

> "That, *so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national, and therefore State, citizenship,* the benefits and burdens of the laws of the State *may at any time repudiate this action* and *reassume its guardianship,* and prevent the Indian from enjoying the benefit of the laws of the State and release him from obligation or obedience thereto" (pp. 508).

The Supreme Court, therefore, holding that the United States cannot reassume guardianship, fully answers the contention that Congress, by the joint resolution of March 2, 1906, and the act of April 26, 1906, section 28, did reassume guardianship. In reality Congress had no intention whatever to reassume or to assert guardianship by the joint resolution and act aforesaid. The existence or the continuance of a tribal relation does not, however, necessarily affect United States citizenship nor necessarily make a member of a tribe either a ward or an alien.

U. S. *vs.* Rogers, 4 Howard, 567.

The language of the joint resolution extending the tribal existence was "for ALL PURPOSES UNDER EXISTING LAWS" (and none other), and the language of the act of April 26, 1906, extending the tribal existence and the present tribal governments was "for ALL PURPOSES AUTHORIZED BY LAW" (and none other).

What does this language mean? What were the PURPOSES "under existing law?" The tribal courts had been abolished by the act of June 28, 1898 (30 Stat., 485), section 28; the enforcement of their laws prohibited in section 26; their treasury terminated by section 19; the Dawes Commission instructed to make up a final roll of persons entitled to tribal property (section 21), and to allot the same (section 11). The tribal existence and tribal government for ALL PURPOSES UNDER EXISTING LAW must be determined under the Curtis Act of 1898 and the Cherokee Allotment Act of July 1, 1902.

The Cherokee Allotment Act of July 1, 1902, gave the consent of the Cherokees by vote that the United States should make the final rolls as of September 1, 1902, and acquiesced and consented to the change of status. The tribal laws had been abolished; the tribal courts had been abolished; the judges, the legislature, and the principal chief could not be re-elected by the Cherokees, in pursuance of Cherokee law, there being no law in force, and no tribal treasury, and no authority to pass, adjudicate, or enforce such laws if they had been elected. Therefore, there was *no legal judiciary*. When the term of office of the legislature expired it was *sine die*, and *no legal legislature* remained. When the term of office of the principal chief expired he was *not legal principal chief*, and his sole authority remaining under the agreement (not law) was to sign his name to patents, the law providing, however, that he might be set aside by the Secretary of the Interior and some Indian citizen appointed in his place to sign patents. Even the patents were inconsequential, being merely evidence of title, the title itself expressly passing with the allotment certificate, which,

by the terms of the agreement, was "conclusive evidence" of title (section 21). The collection of all revenues was put in the hands of the United States (section 64). All funds due the members of the tribes were agreed to be paid by the Interior Department (section 66).

What were the *"purposes under existing law"* for which the tribal existence and tribal government was extended? Absolutely nothing, except THE PURPOSES INVOLVED IN the distribution by the United States of the remaining property owned by the members of the late Cherokee tribe. The United States had agreed (as an agency, *but not as trustee of any title*) to distribute the Cherokee property in equal parts among the members of the Cherokee community. And when the United States made these agreements they were made not with Indians, legally speaking, but with citizens of the United States, who were not, legally speaking, Indians at all.

An Indian, in law, is "an alien," "a ward," a man of inferior political status, "in a condition of pupilage."

A citizen of the United States, although of full Indian blood, is not an alien, is not a ward, is not of inferior political status, and is not in a condition of pupilage and is *not an "Indian" in law.*

For example, the laws of the United States forbid liquor to be sold *an Indian.* Albert Heff, at Horton, Kansas, sold John Butler, a full-blood Kickapoo Indian, liquor. He was convicted, but, on *habeas corpus,* the Supreme Court held Heff had not violated the statute forbidding the sale of liquor to an Indian, although he had sold liquor to John Butler, a full-blood Kickapoo Indian, because John Butler, an Indian by blood, was not *an Indian in law*, but a *citizen of the United States.*

An Indian tribe, in like manner, to fall within the decisions of "domestic dependent aliens," "wards," etc., must be composed of non-citizen Indians. When such tribe has its members made United States citizens the so-called tribe is no

longer a tribe of aliens or wards, and being a member of such tribe does not make such member less than a citizen any more than being a member of the Tribe of Israel or of Tammany would make a citizen of the United States any less a citizen.

Something must be conceded to the frailty of the English language, and when for convenience we now speak of a "Cherokee," or a "member of the Cherokee Nation," we must not be understood to mean anything less than a United States citizen; when we speak of the Cherokee Nation we must not be understood to mean anything less than *a body of United States citizens on the final approved rolls of the late Cherokee Nation.* When we speak of the Cherokee tribal government we must not conceive a tribal government of aliens or wards or anything more than the attenuated vanishing form which we have described.

But the attorneys representing the United States insist that the enabling act admitting the State of Oklahoma was intended to reassume jurisdiction by the United States over these citizens of the United States, members of the late Five Tribes, because in paragraph 1 the following language was used:

> "Provided that nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the INDIANS of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting *such Indians,* their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed."

and because of paragraph 3 of section 3, which provides:

> "That the people inhabiting said proposed State do agree and declare that they forever disclaim *all right and title in or to* any unappropriated lands lying within the boundaries thereof, and to all lands

> lying within said limits owned or held by any *Indian, tribe, or nation;* and that until the title *to any such public land* shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposition and control of the United States."

These reservations as to "any Indian, tribe or nation" cannot be held to apply to persons **who are not Indians under the law.** They are merely the usual reservations common to all enabling acts, by which the United States reserves its rights in relation to its wards. Such reservations are purely formal, and have no reference to United States citizens of Indian blood any more than the liquor law referred to John Butler, the full-blood Kickapoo Indian in the Heff case.

Under the decision in the Heff case, even if Congress *had had the purpose* of reducing to a condition of pupilage those of Indian blood who had been *previously emancipated* by the grant of citizenship, *Congress would not have had the power to do so. But Congress had no intention* to decitizenize a hundred thousand persons who were acknowledged citizens by the implication of these usual formal reservations common to all enabling acts.

IT FOLLOWS THE UNITED STATES IS NOT GUARDIAN OF THE MEMBERS OF THE LATE CHEROKEE TRIBE AND HAS NO CAPACITY TO ACT AS SUCH.

Some comfort is found by the Government solicitors in the recent divided opinion of the Court of Claims, where the majority of the court (Muskrat and Dick *vs.* U. S., No. 330, in considering the authority of Congress over the UNALLOTTED PROPERTY, held as follows:

> "We must *assume* that Congress had some purpose in keeping alive the tribal government until March 4, 1906, and by subsequent acts continuing the same in full force for all purposes under existing laws until all the lands of the nation and the funds to its credit shall have been allotted and distributed.

"By these acts the Government asserted *its continued guardianship* until the final distribution of the common property."

Muskrat & Dick *vs.* U. S. (Rec., 32, § 3).

The court here *"assumes"* Congress *had some purpose* (in the Joint Resolution of March 2, 1906, and in the act of April 26, 1906) in extending the tribal existence and tribal governments "for all purposes *authorized* by law," and *declares* this purpose to be to *assert "its continued guardianship."*

In Brown and Gritts *vs.* U. S. (No. 330) the Court of Claims, having "assumed" a fatal error in the Muskrat case, proceeded to *"assume the validity* of those provisions continuing the tribal existence and tribal government of the Cherokee Nation in force and effect until all property of said nation shall have been distributed among the individual members thereof," [Brown and Gritts *vs.* U. S. (Rec., 36, § 4),] and thereby *"assumed"* the *validity* of an act of Congress which the court had just declared to have had the purpose to *assert* the *continued guardianship* of Congress over the Cherokees (*supra*).

The answer to all this is:

1st. That Congress had relinquished its guardianship by the grant of citizenship (Heff case, 197 U. S., 488), and had no such thing as a *"continued guardianship"* to assert.

2d. That such guardianship, once relinquished by the deliberate act of Congress, cannot be reassumed without the consent of the individual Indian and of the State (*In re* Heff, 197 U. S., 488).

3d. That the Joint Resolution of March 2, 1906, and the act of April 26, 1906, extending the tribal government "for all purposes authorized by law" did not contemplate reassuming a guardianship systematically and deliberately relinquished, as heretofore abundantly shown (*supra*).

The tribal existence and the tribal government might exist in fullest measure, every member being a United States citi-

zen, without the slightest inconsistency and without establishing any guardianship over "wards," any more than the existence of an authorized community of Quakers holding communal property in a Federal district would make every citizen stockholder a personal ward and decitizenize him.

What were the *"purposes authorized by law,"* however, for which the "tribal government" was extended?

When the act of April 26, 1906, became a law the only function left by that act was for the designated Principal Chief to sign his name to patents, and in the event he did not do so the Secretary of the Interior had a right to appoint some other citizen of the Cherokee Nation to sign such patents (34 Stats., 139, sec. 6). The tribal courts had been abolished by the Curtis Act in 1898. Every tribal function had been destroyed by that act. After the term of office of the Principal Chief and other officials of the Cherokee Nation then in office expired they no longer had any commission from the Cherokee people to represent them. The only purposes authorized by law remaining unfulfilled was the distribution by the United States of the undistributed tribal property, and for this reason the joint resolution of March 2, 1906, only extended the tribal existence *until the tribal property was distributed.*

Nowhere appears any "purpose authorized by law" whereby the continuance of the so-called tribal government should reduce the members of such tribe from the superior political status of citizens of the United States to the inferior political status of domestic dependent aliens or wards.

The plea upon which the tribal existence and tribal governments were extended "for all purposes authorized by law" was SOLELY that if "the tribal existence" and "tribal governments" ceased, it might be construed to be abandonment of the undistributed tribal property, which would thus revert to the United States, become public domain, and be claimed by the M., K. & T. R. R. Company.

It will be remembered that *in the Cherokee* Patent of 1838

a provision was inserted that the land should revert to the United States if the Cherokee Nation became extinct.

The M., K. & T. R. R. Co. claimed the land whenever the Indian title reverted to the United States. To prevent this possibility, which it was represented by the Interior Department to Congress might occur the moment the tribes "ceased to exist," the Joint Resolution of March 2, 1906, and section 28 of the act of April 26, 1906, "extending the tribal existence" were passed. [Cong. Record, Feb. 28, 1906, Vol. 40, part 4, pp. 3120, 3222.]

The Court of Claims, by the jurisdictional act in the Muskrat-Dick and Brown-Gritts cases, was charged with the duty of determining the validity of the McCumber Amendment (passed on theory of guardianship) in the following terms, to wit: "To determine the validity of ANY acts of Congress passed since the act of July first, nineteen hundred and two, in so far as said acts or any of them, *attempt to increase or extend* the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902," etc.

The McCumber amendments were based on theoretical guardianship, which the Cherokees vigorously denied, and of which Congress entertained so serious a doubt that it immediately afterwards authorized these suits for the express purpose of testing the validity of any of its acts based on this theory of guardianship.

The Court of Claims, in determining this delicate question, says (Rec., 32, par. 3),

> "We must assume that Congress had some purpose in keeping alive the tribal government until March 4, 1906, and by subsequent acts continuing the same in full force for all purposes under existing laws until all the lands of the nation and the funds to its credit shall have been allotted and distributed. By these

> acts the Government *asserted its continued guardianship* until the final distribution of the common property."

It is a fatal error to hold that the Government asserted its continued guardianship. It had no guardianship, after the act of March 3, 1901, granting full citizenship. The Government's relation thereafter was merely that of an agency authorized to distribute the property owned by these citizens of the United States and to distribute it in accordance with the terms of the contract expressed in the act of July 1, 1902. The Court of Claims assumes that the purpose of Congress was to assert a continued guardianship.

No such assumption is necessary and no such guardianship existed. If, however, the joint resolution of March 2, 1906, and section 28, of the act of April 26, 1906, extending tribal existence had the purpose of asserting the guardianship over these people it was the duty of the Court of Claims under the jurisdictional act to find such legislation of March 2, 1906, and section 28, of the act of April 26, 1906, invalid for the very reason that such laws on this theory attempted to set up a guardianship over citizens of the United States.

By assuming the validity of these acts and the assertion of guardianship valid it necessarily follows that the court must find the McCumber amendment valid, which merely exercised the guardianship assumed by the court to exist. The Court of Claims having been directed to judicially ascertain the validity of the McCumber amendment, has in effect, assumed the validity of that statute by assuming as a premise that Congress had by valid statute *asserted continued guardianship.*

The Court of Claims concludes:

> "It follows that we must hold that the act of April 26, 1906, as amended, is a valid statute, though we may add that if we entertained doubt, *we should, nevertheless, incline to resolve all doubt in favor of*

the validity of the statutes, leaving the Supreme Court to finally determine the question." (Italics ours.)

The error of the court consisted in *assuming* that the statutes of March 2, 1906, and April, 1906, asserted guardianship, and assuming that they were valid although asserting guardianship, and then interpreting the validity of the McCumber amendment, which was based on the assertion of guardianship, in the light of such assumption.

The court was further misled by using as precedents Worcester *vs.* Georgia, 6 Pet., 515; U. S. *vs.* Kagama, 118 U. S., 375; Cherokee Trust Funds, 117 U. S., 288; Lone Wolf *vs.* Hitchcock, 187 U. S., 553; Cherokee Nation *vs.* Hitchcock, 187 U. S., 294—every one of which deals with Indians at that time occupying the status of aliens and wards, and not occupying the status of United States citizens, and therefore misleading in determining the status of people who had become by law citizens of the United States.

United States Not Grantor Nor Trustee of the Title

Another class of cases, which are urged by Government counsel, are cases above cited, where the United States as grantor and as trustee of the title has brought an action to defend the estate held in trust, such as the case of the United States *vs.* Rickert, 188 U. S., 432.

Smith *vs.* Stevens, 10 Wall., 321.

Beck *vs.* Flournoy Live Stock and Realty Co., 65 Fed., 35.

United States *vs.* Flournoy Live Stock & Realty Co., 71 Fed., 576.

United States *vs.* Thurston County, 143 Fed., 287.

National Bank of Commerce *vs.* Anderson, 147 Fed., 87.

United States *vs.* Dooley, 151 Fed., 697.

In the Rickert case the United States as grantor held the title in trust for 25 years and as trustee had a right to defend it against interference by State taxation.

Government counsel offers the case of Smith *vs.* Stevens, 10 Wallace, 321, as an authority that Congress may by subsequent legislation control the disposition of lands granted to an Indian and still under his ownership.

The plain fact is that Congress itself made the grant to Victoria Smith in 1860 of the title to a piece of land previously held by occupant right and accompanied such grant with the proviso that it should not be sold except through the Secretary of the Interior. Her sale to Stevens directly was held void. In other words the United States as grantor imposed a condition upon the grant as it had a right to do and enforced it, and it has no application to the case at bar where the United States was not grantor and did not impose a condition.

Moreover, in the Smith *vs.* Stevens case the United States made no attempt to attach any subsequent condition, but only enforced the condition imposed at the time of the grant.

In the Thurston County case, the Anderson case and the Flournoy cases and in the Dooley case the United States was holder of the property in trust and had a right to defend it. None of these cases have any relation to the case at bar for the reason that the United States is not a trustee of the title, was not grantor and did not impose any restrictions as grantor and had no capacity to impose restrictions in the capacity of guardian.

Cases Where the United States Retained Jurisdiction of the Locality.

Much emphasis is laid by Government counsel upon the following cases:

United States *vs.* Celestine, 215 U. S., 278;
United States *vs.* Sutton, 215 U. S., 295.
Dick *vs.* United States, 208 U. S., 340.

These cases have no force for the reason that in the Celestine case the United States exercised jurisdiction over Bob Celestine because the crime was committed on an Indian reservation of which the United States had exclusive jurisdiction, and, moreover, Bob Celestine was not a citizen of the State nor subject to the laws of the State.

In the case of Dick *vs.* The United States the United States had expressly retained jurisdiction over the land allotted to the extent of prohibiting the sale of liquor thereon, and was the valid exercise of a treaty right. The case of Sutton was of like purport.

Even where the Indian is an alien and a ward and the United States is grantor no subsequent interference by Congress or by the Secretary is valid.

In the Jones *vs.* Meehan case, 175 U. S., 1, the United States having granted Moose Dung a reservation which descended to his son Moose Dung, Jr., conveyed this non-citizen Indian a good title. He leased it to Meehan Brothers for $25 per annum, and several years afterwards leased it to Jones. Congress authorized the Secretary of the Interior to approve the Jones lease. The Secretary approved it for $400 per annum. This honorable court held the act of Congress and the act of the Secretary invalid as proposing to interfere with a vested right.

The Argument of Incompetency.

It has been urged by Government counsel and by the Court of Claims that the full-blood Cherokees are incompetent to manage their own property without the supervision of the Secretary of the Interior; that they are uneducated, unable to speak the English language, and are in danger of "designing persons;" that they are in the main in favor of the extension of the restrictions (Findings 14 and 16); that Brown and Gritts have never been granted authority to represent the Cherokee nation or any of the enrolled citizens thereof *except as provided by the jurisdictional act.* (Findings of Fact 12, 14, 16.) These findings rest upon the testimony of a few partisan witnesses. Such testimony is immaterial, and the facts so found are immaterial.

Judge Howry, in his dissenting opinion (Rec., 43), says in regard to this:

> "The partisan statements of the few individuals who have undertaken to testify should no more influence the action of the court on the constitutional question than the report of the Senate Committee on the same subject (predicated upon two volumes of printed testimony) to the effect that the later legislation was unwise and injurious to the Cherokees."

Citizens of the United States cannot be thus deprived because of their race and blood of their constitutional rights or of vested property rights or of personal privileges and immunities on the theory that they are by blood and race incompetent. The courts of the country give full and adequate protection to all incompetents, and such an act of legislature is not due process of law.

This honorable court will take judicial notice that as far back as 1830, in the case of the Cherokee Nation *vs.* Georgia, it was recited in the record of that case that the Cherokees, then almost entirely full-blood Indians, had a written con-

stitution, modeled on that of the States, with their government divided into legislative, executive, and judicial branches; that they were regarded by the government of the United States as entirely competent to transact their own affairs and support themselves; that they had their own churches and schools; that they had ceased to be hunters, and were farmers and stock raisers and mechanics, with teachers and preachers, with lawyers and doctors of their own people; that they had all the habits of civilized life, with orchards and gardens and cultivated farms; with domestic animals and fowls, making their own living, and recognized by the United States as entirely competent to do so. They had even invented at that time a phonetic, syllabic alphabet which all Cherokees could read. They had a printing press of their own, printing both the English and Cherokee languages, publishing a newspaper of their own. These people have had every advantage of education from that time to this, over eighty years. They have so intermingled with the white race that out of 37,000 enrolled Cherokee citizens only a little over 8,000 are enrolled as full-blood Indians.

The Congress of the United States authorized Brown and Gritts, who are full-blood Cherokees, to bring this suit, and no better authority to appear for the full-bloods is possible. No full-blood has intervened to question the propriety of the suit or to raise any objection whatever.

Credit is given the solicitor for appellees in the case of the United States *vs.* Allen, 179 Fed., 13, for assistance rendered in the preparation of this brief and for data furnished and for matter quoted from the brief filed by him in that cause.

It is urged that the judgment of the Court of Claims, dismissing the petition of Brown and Gritts, and overruling their motion for a new trial, should be reversed.

CHARLES WEST,
Attorney General of the State of Oklahoma.

EXHIBIT A.

(Copy.)

Com'r.

DECEMBER 2, 1910.

Hon. CHARLES WEST,
Attorney General, Guthrie, Oklahoma.

SIR: I am glad to give you the following information, at the request of Senator Owen:

Full-blood Allotments, June 30, 1909, *Five Tribes.*

Tribe.	Full-blood population, 6-30-09, rep't'd by Com'r to Five Tribes.	Average acreage of allotments.	Approximate total area allotted to full bloods.
Cherokee	8,698	110	956,780
Chickasaw	1,540	320	482,800
Choctaw	8,420	320	2,694,400
Creek	6,835	160	1,093,600
Seminole	1,255	115	144,325
	26,748		5,371,905

Sincerely yours,
(Signed) R. G. VALENTINE,
Commissioner.

R. E. S.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

WILLIAM BROWN AND LEVI B. GRITTS, ON their own behalf, etc., appellants, *v.* THE UNITED STATES. — No. 331.

DAVID MUSKRAT AND J. HENRY DICK, ON their own behalf, etc., appellants, *v.* THE UNITED STATES. — No. 330.

APPEALS FROM THE COURT OF CLAIMS.

SUPPLEMENTARY BRIEF FOR THE UNITED STATES UPON THE POINT THAT THESE APPEALS SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

In separate briefs heretofore filed in each of these appeals we have made the suggestion that there is no justiciable case or controversy here involved; that the special act authorizing these proceedings seeks merely to secure an opinion from the courts as to the validity of certain legislation of Congress; that no enforceable judgment is authorized and therefore no jurisdiction should be entertained by this court and the appeals should be dismissed.

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Inasmuch as both cases come here under the same special act of Congress and since they have been set down for hearing on the same day, it has seemed proper to present an additional brief confined solely to the jurisdictional question involved in both cases, and to cite herein the authorities which seem conclusively to sustain the Government's contention.

The special act of Congress authorizing the institution of these suits is found in a certain provision of the Indian appropriation bill of March 1, 1907, and reads as follows (34 Stat. 1028):

> That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled "An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and

funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.

Upon the rendition of final judgment by the Court of Claims or the Supreme Court of the United States denying the validity of any portion of the said acts authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two.

The above act constitutes the sole authority for these proceedings. The records in the two cases show that the petitions were filed below under the authority of the above act only, and the relief asked for in the prayers is, in conformity to the terms

of such act, simply that any legislation of Congress, passed after the allotment to the plaintiffs and before the commencement of these suits, which in any way attempts to restrict the alienation of said lands or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokee Indians be declared unconstitutional.

Upon this question of jurisdiction as applied to the two appeals herein we submit the following propositions:

1. No case is here presented which involves the exercise of judicial power by the Supreme Court within the meaning of the Constitution.

2. The procedure and relief must be limited to those provided in the special act under which these suits were brought, and this act authorizes merely an opinion of the court as to the validity of certain legislation of Congress, without the rendition of any enforceable judgment.

3. There is no real controversy here between the appellants and the United States, and no adverse parties, present or prospective. Therefore no case in a legal sense is presented for adjudication.

4. As to the Brown and Gritts case, No. 331, the questions are moot for the additional reason that since the commencement of the suit Congress, by the act of May 27, 1908, has passed another statute renewing and extending substantially the same restrictions upon alienation, and this later act will still be in force whatever may be the finding of the court as to the validity of other legislation.

A mere reading of the act under which these proceedings are brought will show that no "lawsuit" in the accepted meaning of that term was contemplated. Congress attempted merely to provide a method of securing from the Court of Claims and ultimately from this court an opinion as to the validity of certain acts affecting Indian lands and to furnish at public expense counsel on both sides to debate the question.

Whatever may be said of the power of Congress to impose this duty upon the Court of Claims, it is quite clear from the authorities that no jurisdiction in such a proceeding can be conferred upon the Supreme Court.

We shall discuss briefly, in their order, the propositions above set out.

FIRST.

No case is here presented which involves the exercise of judicial power by the Supreme Court within the meaning of the Constitution.

Section 2 of the judicial article of the Federal Constitution provides that "the judicial power shall extend to all cases, in law and equity, arising under the Constitution * * * ; to all cases affecting ambassadors, * * * ; to all cases of admiralty, * * * ; to controversies to which the United States shall be a party, * * * ; to controversies between two or more States," etc., and, further, that "in all cases affecting ambassadors * * * the Supreme Court shall have original jurisdiction."

And, finally, "in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

The question as to what constitutes a case within the meaning of this section has been discussed in many opinions, and various definitions of the term have been given. Without following these discussions and definitions, it is sufficient for the present purpose to state that this court has uniformly held that no "case" arises in which its jurisdiction can be invoked unless at least the adjudication is final and conclusive between the parties and enforceable by execution or other process of the court.

The mere giving of an opinion has always been held not to constitute an exercise of judicial power (Thayer's Cases on Constitutional Law, vol. 1, p. 175), and whenever a proceeding in this court sought merely such an opinion jurisdiction has been denied.

The first instance in which this question was presented to the Supreme Court was in *Hayburn's case* (2 Dall., 409), where there was under consideration an act of Congress requiring the circuit courts of the United States to examine into the claims of officers, soldiers, and seamen of the Revolution and the pensions granted to invalids by that act, and to determine the amount of pay that would be equivalent to the disability incurred and to certify their opinion to the Secretary of War, who was authorized to report the finding to Congress. Every judge of the Supreme Court (excepting Thomas Johnson, of Maryland, who

appears not to have had the question before him) was of the opinion that the law was unconstitutional in that it was not the exercise of judicial power.

This opinion was followed in *United States* v. *Ferreira* (13 How., 40), in which the court considered a special act of 1849, authorizing the district judge of the United States for the Northern District of Florida to receive and adjudicate a claim of Ferreira and certain other persons in pursuance of a treaty of 1819, the several claims to be settled by the Treasury as in other cases under a previous act. Ferreira presented his claim to the district judge, who took testimony and rendered a decision as to the amount. The district attorney prayed an appeal to the Supreme Court. This court, speaking through Chief Justice Taney, declined to take jurisdiction, holding that the proceeding did not call for the exercise of judicial power.

In *Gordon* v. *United States* (Appendix to 117 U. S., p. 697) the opinion was prepared by Chief Justice Taney in 1864, but not printed until 1885. The court had under consideration an act of March 3, 1863, entitled "An act to amend an act to establish a court for the investigation of claims against the United States." This act provided for an appeal to the Supreme Court of the United States from any final judgment or decree rendered in any case by the Court of Claims wherein the amount in controversy exceeded $3,000, or where the judgment or decree would affect a class of cases or furnish a precedent for any action of any executive department. It

further provided that in case of a final judgment by the Court of Claims, or by the Supreme Court on appeal in favor of the claimant, the sum due should be paid out of any general appropriation made by law for the payment of private claims on presentation to the Secretary of the Treasury. Chief Justice Taney said (p. 698):

> Neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury * * * neither court can by any process enforce its judgment; and whether it is paid or not does not depend on the decision of either court but upon the future action of the Secretary of the Treasury and of Congress.

After declaring that there was no objection to the Court of Claims being required to act in a nonjudicial or advisory capacity touching the validity of claims against the United States, the Chief Justice proceeds:

> But whether this court can be required or authorized to hear an appeal from such a tribunal, and give an opinion upon it without the power of pronouncing a judgment, and issuing the appropriate judicial process to carry it into effect, is a very different question and rests on principles altogether different. The Supreme Court does not owe its existence or its powers to the legislative department of the Government. It is created by the Constitution and represents one of the three great divisions of power in the Government of the United States, to each of which the Constitution has assigned its appropriate

> duties and powers and made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial and it can not be required or authorized to exercise any other.

At page 702 it is said:

> And Congress can not extend the appellate power of this court beyond the limits prescribed by the Constitution * * *; nor can Congress authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties and process of execution awarded to carry it into effect.

Again, at page 702, the opinion proceeds:

> The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court, in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this act of Congress.

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Finally, in speaking of the duty of the court to maintain the separation and independence of judicial power, the Chief Justice says (p. 706):

> These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers intrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character and which is not clearly confided to it by the Constitution.
>
> For the reasons above stated we are of opinion that this appeal can not be sustained, and it is therefore dismissed for want of jurisdiction.

The cases of *Ferreira*, *Hayburn*, and *Gordon* v. *United States* have been cited and approved in later cases. Even in the decisions where special acts conferring jurisdiction on the courts to hear particular cases have been sustained because it was found that the acts in express terms gave full power to the court to issue all interlocutory and final orders and to enforce its judgments, the principles enunciated in the cases above cited have been fully recognized and approved. Such a case is *United States* v. *Union Pacific Railroad Company* (98 U. S., 569), where there was under consideration an act of Congress of March 3, 1873, providing that the Attorney-General might

cause a suit in equity to be instituted in the name of the United States against the Union Pacific Company and against all persons who had unlawfully received stock or property of said railroad or the profits or proceeds of contracts with said road, to compel an accounting and repayment. Though the bill, framed under the act, was held not sufficient to constitute a cause of action, the act itself was held to confer judicial power inasmuch as by its terms it was specifically provided that decrees might be entered and enforced against the parties defendant and that the court where the cause was pending might make such orders and decrees, etc., as might be necessary to carry into effect the purposes of the act, thus expressly authorizing final decrees to be carried into effect by execution or other process of the court.

Such a case also was *La Abra Silver Mining Company* v. *United States* (175 U. S., 423), where there was under consideration an act of Congress of 1892 by which the Attorney-General was directed to bring suits in the name of the United States in the Court of Claims against La Abra Company and all persons asserting an interest in the award of commissioners appointed under a certain treaty between the United States and Mexico to determine whether that award was obtained by fraud. In that act full jurisdiction was conferred on the Court of Claims to determine such suit, make all proper interlocutory and final decrees therein and to enforce the same by injunction or other final process. The court considered the scope of the specific provisions of the statute author-

izing all interlocutory and final decrees and enforcement of the same by injunction or other final process, and the further provision that the appeal to the Supreme Court should be under the rules or practice which govern appeals to that court, and came to the conclusion that the act authorized a conclusive determination as between the parties of the rights claimed by them, respectively, and therefore called for a proper exercise of judicial power.

The principles announced in the *Gordon* case and others following it are firmly established. To quote the language of Chief Justice Taney in *Gordon* v. *United States* (p. 704):

> Indeed no principle of constitutional law has been more firmly established or constantly adhered to than the one above stated—that is, that this court has no jurisdiction in any case where it can not render judgment in the legal sense of the term.

Especially should these principles apply where a proceeding is authorized to secure from this court merely an *opinion* as to the constitutionality of an act of Congress.

SECOND.

The procedure and relief must be limited to those provided in the special act under which these suits were brought and this act authorizes merely an opinion of the court as to the validity of certain legislation of Congress, without the rendition of any enforceable judgment.

The act of March 1, 1907, under which this appeal is prosecuted is a special act of Congress providing for a suit and regulating the procedure in such suit. The substance of its provisions is as follows: William Brown and Levi B. Gritts and others are authorized and empowered to institute their suits in the Court of Claims "to determine the validity of any acts of Congress" passed since a certain act of July 1, 1902, so far as said acts attempt to extend restrictions upon alienation, etc., of the lands of Cherokee citizens or to increase the number of persons entitled to share in the distribution of certain lands; the suits shall be brought before September 1, 1907, against the United States as defendant and shall be defended by the Attorney-General; upon the rendition of final judgment denying the validity of any portion of said acts the court shall determine the amount to be paid attorneys employed by the above-named persons and render judgment therefor.

In a proceeding such as this, where the jurisdiction which the court exercises is a special one created by an act of Congress which prescribes the mode of proceeding, the court is limited by the exact terms of the act and can not on any supposed analogy to

proceedings in other cases exercise any power or grant any relief beyond that which the act gives.

This rule is laid down in *United States* v. *Knight* (1 Black., 488). In this case Chief Justice Taney, speaking of an act conferring special jurisdiction on a court to determine rights of claimants under certain grants which had been made by the Mexican Government to private individuals, says (p. 489):

> But the jurisdiction which the court exercises in this case is a special one, created by act of Congress, and its mode of proceeding and powers are regulated and defined by the law; and it can not, under any supposed analogy to proceedings in chancery, exercise any power beyond that which the act or acts of Congress have given.

In *United States* v. *Ferreira* (13 How., 39), already cited, the court say, at page 49:

> It would seem, indeed, in this case, that the district judge acted under the erroneous opinion that he was exercising judicial power strictly speaking under the Constitution, and has given to these proceedings as much of the form of proceedings in a court of justice as was practicable. A petition in form is filed by the claimant; and the judge states in his opinion that the district attorney appeared for the United States, and argued the case, and prayed an appeal.

The court points out that the act required none of these things. In considering whether the act conferred judicial power the terms of the act were

to be looked at and not the fact that the proceeding below had been converted into a judicial one by the taking of steps not authorized by the act.

In *United States* v. *Union Pacific Railroad Co.* (98 U. S., 569), already referred to, the court in passing upon the question whether the suit there involved was judicial in its nature pointed out that the character of the proceeding must be limited by the terms of the act. Say the court at page 609:

> This consideration makes it clear that any bill brought by the Attorney-General under the fourth section of the act of 1873 *must be limited by the provisions of that act both as to the grievances on which it counts and the relief which it seeks.*

At page 608 the court say:

> We are of opinion that nothing other than what is found in the act, by express language or by fair implication, can be introduced into this suit as a foundation for the action of the court.

The court in that case, confining the bill to the terms of the act, reached the conclusion that the bill did not state a cause of action under general principles of equity jurisprudence. The charge made in the bill was that the board of directors of the railroad company had made contracts which were a fraud upon the company. The court said that this would be a proper subject of action in a proper case, but relief could not be granted in the case before it because the company was not a complainant. The persons who were defrauded were innocent stock-

holders, but they were not parties to the bill and the act did not permit them to be parties. No decree, therefore, could be entered in favor of the railroad company on account of these transactions. The court then proceeded to inquire whether the bill made a case in which the United States would be entitled to relief, and found that there was no ground for relief on behalf of the United States. Demurrer to the bill was therefore sustained.

The court, in the *Union Pacific* case, very carefully recognized and applied the rule that a proceeding under a special act must be confined to the terms of the act. In substance, the proposition in that case was this: The bill must be limited in the matter of parties, relief, etc., to the act which authorized it. Though the bill might be good if making allegations and parties not authorized to be made by the act, yet confining the bill to that permitted by the act it did not state a cause of action.

Nor will it do to say that some other suit might have been brought in which an appeal might properly have been allowed. In reference to a similar question, in the *Union Pacific* case, already cited (98 U. S., 569 at 619) the court say:

> We are not prepared to say that there are no trusts which the United States may not enforce in a court of equity against this company. When such a trust is shown, it will be time enough to recognize it. But we are of opinion that there is none set forth in this bill which, *under the act authorizing the present suit, can be enforced in the Circuit Court.*

In the language of Mr. Justice Brewer in *Pacific Whaling Co.* v. *United States* (187 U. S., 447 at 454):

> We are not called upon to decide what remedy by suit or action, if any, the petitioner may have. It is enough now to hold * * * that this novel proceeding was not a suit or action in which a final decree or judgment was entered from which the petitioner could take an appeal to this court.

Confining ourselves, therefore, to the terms of the act of 1907 in determining the character of the power authorized by it, it is seen that it does not provide for an ejectment proceeding or an action to quiet title; it does not require the persons named in the act to allege any interest in any property or to show that any act is about to be taken that will injure them in their property rights or otherwise; that they are about to alienate their land or have alienated it contrary to the provisions of the statute complained of; it does not authorize nor permit an injunction against any officers or other persons seeking to interfere with the rights of those bringing the suit. By its express terms it authorizes only an application to the Court of Claims "to determine the validity of any acts of Congress passed since said act of July 1, 1902." It mentions no judgment other than one determining the amount that shall be paid attorneys employed by the parties authorized to make the application. All that can be asked for or granted under the provisions of the act is an opinion that certain acts of Congress are valid or invalid. Such a proceeding is not an

action, suit, or case within the constitutional provision, Article III, section 2, in which was entered a final judgment or decree, an appeal from which could be authorized to be heard by this court.

THIRD.

There is no real controversy here between the appellants and the United States, and no adverse parties, present or prospective; therefore no case, in a legal sense, is presented for adjudication.

It will be observed that both these suits are against the United States. Brown and Gritts have sued the United States because Congress passed an act regulating the alienation of allotted Indian lands; and Muskrat and Dick have sued the United States because Congress passed an act regulating the distribution of unallotted Indian lands and of funds belonging to Indians.

It is certainly a new and unprecedented departure from familiar principles to suppose that where one claims an injury to some property right by a legislative enactment he may find his remedy, not in a suit against some officer who is attempting to enforce the law, or against some individual who sets up an adverse claim under it, but in a suit against the sovereignty whose legislative department passed the offending statute.

In these proceedings at bar Brown and Gritts do not allege that they have attempted to alienate or encumber their lands and that somebody is interfering; they do not ask any process of the court compelling or restraining some act which will determine and

enforce their rights with respect to the lands involved. They simply ask the court to say whether or not certain acts of Congress are valid. So in the *Muskrat and Dick* case, the appellants do not allege that the new persons admitted by the act of Congress to a share in the undistributed lands and funds of the Cherokees have taken, or are threatening to take, possession of such lands or funds, or that any officer of the Government is about to put them into such possession; nor do they make any claim whatever which, even if admitted, could form the basis of a judgment. They also simply ask the court to say whether or not a certain act of Congress is valid.

There is no dispute, in a legal sense, between these appellants and the United States. There is no conflict of right or title, nor adverse claim of any character, between the plaintiffs and the defendant in these proceedings. The cases can not be likened to a suit to quiet title, for the United States is not asserting any adverse title to the lands. It has no property or pecuniary interest whatever in the question presented.

It thus appears that there is here shown neither of the essentials to make a case justiciable in the courts. There is neither a present controversy nor adverse parties.

It may well be that there are appropriate suits in which the constitutionality of these acts of Congress may be tested, but such suits must proceed against those who assert some property right under the acts adverse to the appellants, or against some

one who is threatening to enforce the acts to the immediate and irreparable injury of the appellants. But these suits against the United States settle nothing whatever, and no judgment, even if authorized in the present case, could avoid another examination of the same questions whenever a real controversy between real parties in interest arises.

It would seem unnecessary to argue that where property rights are affected by regulations of law, adverse claims thereunder must be fought out between the adverse claimants and not in suits against the Government which passed the law. If a state legislature should enact a statute imposing new restrictions upon the alienation of lands by infants, or requiring additional witnesses to deeds or wills, or changing the rules as to descent and distribution of real and personal property, certainly no suit would lie against the State to test the validity of such acts, and no court would entertain such a suit even if the plaintiff were empowered by the legislature to bring it. So if a state legislature should pass an act expropriating the land of "A" and attempting to give it to "B," the suit that would result would be between "A" and "B" and not between "A" and the State.

Yet in these proceedings at bar the United States, which is asserting no claim whatever to the lands in controversy; which has no pecuniary interest in the matter; which is not charged, either as a corporate entity or by means of some of its officers, with attempting or threatening to enforce any of the acts

complained of, is sued, and the only basis for the suit is that Congress passed certain acts affecting Indian lands and then authorized the plaintiffs to bring an action against the United States to test their validity.

We submit that this does not present any case, within the meaning of the Constitution, of which jurisdiction can be taken in this court.

There are two decisions of this court which clearly support our contention upon this point. The first of these is *Williams* v. *Hagood* (98 U. S., 72), where a suit was brought by the holder of certain certificates of indebtedness issued by the State of South Carolina, and it was sought to compel certain officers of that State to levy taxes for the redemption of said certificates and to accept them in payment of taxes, in accordance with certain statutes of the State upon the faith of which the certificates had been accepted by the holder, and which statutes had been subsequently repealed to his injury. An appeal to this court from a judgment adverse to the certificate holder in the court below was dismissed on the ground that the appellant had not averred that the state and local officers had neglected or refused to perform their duty; that any demand had been made upon them or any tender of the payment of taxes with the certificates of indebtedness. The object of the suit, said Mr. Justice Strong—

> is plainly to obtain from this court a declaration that the legislative acts of October 22 and December 22, 1873, are unconstitutional, because impairing the obligation of the

> contract made by the act of 1872, and the certificates thereby authorized and thereunder issued, and this without any averment that the complainant will be injured by them. The question presented to the court is, therefore, merely an abstract one; such a one as no court can be called upon to decide, etc. (p. 75).

The second case is that of the *Chicago and Grand Trunk Railway Company* v. *Wellman* (143 U. S., 339). There the court had under consideration a friendly suit, brought like these at bar, to determine the validity of certain acts of the legislature without the intervention of any real controversy. Mr. Justice Brewer announces a general principle which is especially applicable in the present instance. At page 345 he says:

> Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

The principles stated in the preceding cases were recognized in a striking manner by this court in *Minnesota* v. *Hitchcock*, 185 U. S., 373, 387, 388. In that case the State of Minnesota brought suit in this court to enjoin the Secretary of the Interior from selling any sections 16 and 36 in an Indian reservation located within the State of Minnesota. The State contended that those sections had been granted to it as school lands. The Secretary of the Interior, on behalf of the United States, contended that previous to the grant under which the State claimed the sections had been reserved for an Indian reservation, and thereby separated from the public domain of the United States, and not intended to pass to the State by virtue of the alleged grant. The suit was brought under the act of March 2, 1901, c. 808, 31 Stat., 950, which provides in part as follows:

> That in any suit * * * instituted in the Supreme Court of the United States to determine the right of a State to what are commonly known as school lands within any Indian reservation * * * or in the disposition thereof by the United States, the right of such State may be fully tested and determined without making the Indian tribe * * * a party to the suit if the Secretary of the Interior is made a party thereto.

Although the defendant did not question the jurisdiction of the court, this court considered at length the question of whether the suit, authorized and brought under said act, presented a real controversy

between the United States and the State of Minnesota. It held that it did upon the following grounds: The legal title to the lands was in the United States; the officer named as defendant had no interest in the lands, or the proceeds thereof; the United States was proposing to sell them. The suit sought to restrain the United States from such sale and to divest the Government of its title and vest it in the State. In a word, the United States was the real party that would be affected by the judgment and against which it in fact would operate.

In answer to the contention that the United States had no substantial interest in the lands because it held the legal title under a contract with the Indians and in trust for their benefit, this court said:

> This is undoubtedly true, *and if the case stood alone upon the construction of the treaty between the United States and the Indians there might be substantial force in this suggestion.* [Our italics.] But Congress has, for the Government, assumed a personal responsibility.
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> Can the court say that the United States may not assume such responsibility; may not waive all objections on account of the mere matter of trusteeship, and stand in court as the responsible owner, against whom all litigation may be directed?
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FOURTH.

As to the Brown and Gritts case, No. 331, the questions are moot for the additional reason that since the commencement of the suit Congress, by act of May 27, 1908, has passed another statute renewing and extending substantially the same restrictions upon alienation, and this later act will still be in force whatever may be the finding of the court as to the validity of other legislation.

It will be noticed that with respect to both these appeals the court is asked to consider only certain acts of Congress, to wit, those passed after July 1, 1902, and before the commencement of this suit, which in any way attempt to extend restrictions on the alienation of the lands involved or increase the number of those who shall share in unallotted lands and undistributed funds. That is to say, there is not here presented, even as between these appellants and the United States, any question which will finally determine the rights or claims between them as to the alienation or distribution of their lands. In other words, the question presented is not whether the Indians hold their lands free from restraint upon alienation or their undistributed shares free from the claims of other parties, but what effect upon these rights results from *particular acts of Congress*. To put it another way: There is no final adjudication authorized or possible between these Indians and the United States with respect to the title, interest, or dominion over these lands, and no judgment can be rendered fixing such rights or enforcing them.

But with respect to the suit of Brown and Gritts, No. 331, the question is moot for the further reason that Congress, by the act of May 27, 1908, *after the passage of the act authorizing the suit, and after the suit was begun*, passed another statute imposing substantially the same restrictions upon the alienation of the lands involved, and the later statute will now prevent alienation, whatever the opinion of the court may be as to earlier legislation, for the constitutionality of the later act is not here questioned.

The act of May 27, 1908, is set forth in full in the principal brief on behalf of the Government. (See brief for the United States in *William Brown and Levi B. Gritts* v. *United States*, No. 331, October term, 1910, pages 15, 16, 17, and 18.) It provides:

> That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows:

Then follow various restrictions, the pertinent ones being in substance that full-blood Cherokee Indians (to which class Brown and Gritts belong) shall not alienate any lands, whether homesteads or surplus lands (heretofore or hereafter allotted to them) until on or after April 26, 1931, except with the approval of the Secretary of the Interior, nor alienate any lands inherited by them except with the approval of a court having jurisdiction of the settlement of the estate of the deceased allottee.

There are also certain provisions with respect to the leasing of lands, and then followed other matters not now pertinent. The scope and purpose of the act of May 27, 1908, are clearly to fix the present status of all lands heretofore or hereafter allotted to members of the Five Civilized Tribes, including the lands of appellants, with respect to any and every manner of alienation or incumbrance, and to modify or repeal any and all previous acts inconsistent with the new declaration of Congress. This act of 1908 is not attacked and can not be attacked in the present proceeding.

It follows, therefore, that the validity or invalidity of previous acts of Congress extending restrictions upon the alienation of any of these lands is now a moot question.

The principle is well settled that where an event happens which makes the question before the court at the time it is ready to be heard a moot question, the proceedings should be dismissed. (*Mills* v. *Green*, 159 U. S., 651; *California* v. *R. R.*, 149 U. S., 308; *San Mateo County* v. *R. R. Co.*, 116 U. S., 138; *Little* v. *Bowers*, 134 U. S., 547; *Board* v. *Glover*, 160 U. S., 170.)

In the case of *Pennsylvania* v. *Bridge Co.* (18 How., 421) an injunction was secured against the erection of a bridge as an obstruction to navigation. Subsequently Congress passed an act authorizing the bridge as constructed. On application to the Supreme Court the injunction was dismissed on the ground that the question was moot whether the bridge had been, before the act of Congress, an obstruction.

In *Linn* v. *Hewitt* (55 Ia., 505, approved in *Mills* v. *Green*, 159 U. S., 656) it was held that an order refusing an injunction against building a railroad along a highway, though erroneous when made, should not have been reversed when the legislature, pending the appeal, had authorized the act complained of.

In *Dinsmore* v. *Southern Express Company* (183 U. S., 115) this court had under consideration an action brought by owners of certain stock in an express company seeking a decree that would prevent an application by that corporation of any of its moneys to meet the requirement of the war-revenue act of 1898 with relation to adhesive stamps to be placed upon bills of lading, etc. The war-revenue act required that every railroad, express company, etc., should issue a bill of lading and attach a stamp of the value of 1 cent. A complaint was made to the Railroad Commission of Georgia that defendant express company was requiring shippers to supply the requisite stamps for such bills of lading, and the Commission ordered the stamp to be supplied by the express company and not by the shippers. Action was then brought in the United States Circuit Court to declare the order of the Railroad Commission void. The Circuit Court held the order void and on appeal to the Circuit Court of Appeals the decree was reversed and the case dismissed. The case was brought to the Supreme Court upon writ of certiorari. After submission of the case to the Supreme Court that part of the war-revenue act of 1898 relating to stamps to be attached to bills of lading, etc., was amended in such

a way as to exclude express companies from the requirement. The Supreme Court say, page 119:

> This change in the law renders it unnecessary to consider any of the important questions determined in the Circuit Court and Circuit Court of Appeals under the act of 1898. The object of this suit was to prevent the enforcement of the order of the Railroad Commission based upon its construction of that act. But whatever might be now held as to the meaning and scope of the act of 1898 as applied to express companies, the amendatory statute of 1901, in declaring what companies, corporations and persons shall attach the required stamp to bills of lading, manifests and receipts for goods or other property to be transported, distinctly excludes express companies. So that no actual controversy now remains or can arise between the parties.
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> "It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."

With reference to the case at bar, therefore, the act of May 27, 1908, having fixed the status of Indian lands as to restraints upon alienations, etc., the validity of previous acts extending such restrictions is a moot question, and the present appeal should be dismissed.

There is another aspect in which the act of May 27 1908, must be regarded that is important here. Notwithstanding the provisions of the act of March 1, 1907, providing that Brown and Gritts might bring suit to determine the validity of certain prior acts of Congress extending restrictions upon the alienation of Indian lands, Congress, by the act of 1908, settled definitely the status of such Indian lands so far as restrictions upon alienation were concerned, and *there was no authorization of any suit to determine the validity of the latter act.* Congress must be regarded as having intended, therefore, by the act of 1908 to settle finally the status of the lands allotted to the allottees of the Five Civilized Tribes as regards restrictions upon alienation, and to have this act supersede all prior acts affecting restrictions upon alienation not already removed. It follows from this that Congress has, in effect, withdrawn permission to bring this suit, which concerns only acts now superseded.

By the act of May 27, 1908, Congress expressly amended one section of the act brought into question in the *Brown and Gritts* case, to wit, the act of April 26, 1906. Congress further provided that the act of 1908 should not be construed to impose restrictions that had already been removed from lands under prior acts, and as to all other matters relating to restrictions upon alienation the new act makes full provision. In other words, Congress by the act of 1908 completely disposed of the entire situation; determined what parts of previous acts should remain;

what parts should be amended; what effect alienations already completed should have, and what should be the status of all the Indian lands involved. So it appears that Congress has itself made the *Brown and Gritts* case now before the court a moot case, and for this reason also the appeal should be dismissed.

We therefore submit that these two appeals now before the court should be dismissed, because as to each the proceeding in the Court of Claims did not constitute a case from which an appeal could, under the Constitution, be given to this court.

As to the *Brown and Gritts* case, No. 331, the appeal should be dismissed for the further reason that because of the act of May 27, 1908, there is now presented to the court only a moot question.

WADE H. ELLIS,
HENRY E. COLTON,
Special Assistants to the Attorney-General.

NOVEMBER, 1910.

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and the suits proceed along the line of this amendment.

Mr. McCUMBER: Will the Senator state wherein the amendment, which he designates as the McCumber amendment, will be questioned in this proceeding? How can it possibly arise in the three cases referred to?

Mr. CLARK of Wyoming: It arises in the Laura Secondine case, as I remember it, by reason of the fact that she is upon the full-blood roll. There are two questions in her case. The petition in the case is directed against the McCumber amendment, by which her right to alienate was thrown over twenty-five years. Just the particular point in each of the three cases I am unable to state. It is all in the memorial which was presented by the Senator from Kansas (Mr. Long). All of the cases go to the particular point we have had so much difficulty about, and which I should be glad to have settled. (Cong. Rec., 59th Cong., 2d sess., Vol. 41, p. 2454.)

The two questions for the court to determine, which are referred to in the statement of Senator Clark, are the power of Congress to impose further restrictions upon alienation, incumbrance, or leasing of allotments involved in this case, and the power of Congress to allow children born of Cherokee citizens after September 1, 1902, to share in the allotment of Cherokee tribal lands involved in the case of *Muskrat and Dick vs. The United States* (44 C. Cls., 137), set down for hearing in the Court of Claims with this case. All of which provisions at the time of the institution of these two suits were contained in the act of April 26, 1906, and the act of June 21, 1906 (34 Stat., 325), though Congress appears to have anticipated the decision of this case by enacting legislation still further restricting alienation and leasing.

After the suit had been brought the petitioners attacked the validity of the act of March 11, 1904, *supra*,

"An act authorizing the Secretary of the Interior to grant rights of way for pipe lines through Indian lands," upon the ground that the damages arising from the rights of way through allotted lands, instead of being paid to the allottee, were being diverted and paid into the tribal funds (original petition, Rec., pp. 6 and 7). This contention of the petitioners was based upon a mistake of fact, as the damages arising from rights of way through the lands of allottees were paid to such allottees, and only where the rights of way ran through unallotted lands were the damages paid into the tribal fund (Rec., p. 24).

However, had the facts been as believed by the petitioners, still the court would have had no jurisdiction to consider the validity of this act, because it does not "attempt to increase or extend the restrictions upon alienation, incumbrance, or the right to lease the allotments of lands of Cherokee citizens."

The appellants have also in an amended petition, filed March 26, 1908 (Rec., pp. 13 and 14), attacked an item of the Indian appropriation act of March 1, 1907, *supra* (the same act containing the jurisdictional clause), providing for certain expenses in leasing the lands of full-blood Indians and the sale of inherited and other lands. The court has no authority to consider the validity of this act, first, because it does not "attempt to increase or extend the restrictions upon alienation, incumbrance, or the right to lease the allotments of lands of Cherokee citizens"; second, because it is a provision of the same act which contains the jurisdictional act, and it is hardly possible that Congress intended to confer jurisdiction upon the court to construe this act also; and, third, because the appropriation provided by the act was reimbursed and the regulations under which the expenses were collected were revoked by the Secretary of the Interior prior to the filing of the petitioners' amended petition on March 26, 1908, complaining of the provision in question (Rec., pp. 28 and 29). The fact that the amended

petition was not filed prior to September 1, 1907, *as required by the jurisdictional act,* is rather strong evidence that the petitioners did not themselves believe that the court had any right to construe this clause, but they were only catching at straws in an effort to save something from the wreck. All of which agrees quite well with the statement of the chairman of the Judiciary Committee as to the questions involved at the time the matter was referred to the court.

The Court of Claims declined to consider the act of March 1, 1907, *supra,* for the following reasons:

> By an amended petition filed March 26, 1908, long after the time fixed by the jurisdictional act for the commencement of suit, the claimants attack a provision in said jurisdictional act (March 1, 1907, p. 1025), charging the lands allotted to full-blood Cherokees with clerical expenses connected with the leasing of such allotments for mineral and other purposes; but, as that provision clearly is not covered by the language of the jurisdictional act respecting the extension of the restrictions upon alienation, incumbrance, or the right to lease allotments, we will not consider it further than to say that the money so used was reimbursed before the filing of the amended petition herein, and it has since been omitted in the appropriation act of April 30, 1908 (35 Stat., L., ——); and besides it can hardly be said that Congress intended the court to consider the validity of the provision in the same act that contained the jurisdictional clause.

Nor is section 22 of the act of April 26, 1906, providing that the sale and conveyance of the inherited lands of Cherokee full-bloods should be subject to the approval of the Secretary of the Interior, before the court for construction in this case, because neither of the petitioners who have instituted this suit have any such interest as would entitle them,

or either of them, to have this question adjudicated. William Brown sues as the sole heir of the fee simple estate of his deceased son, Charles Brown, who died intestate, leaving surviving him a half-sister on his mother's side, and his father, who was legally entitled to only a life estate in the allotment of his son under chapter 49, section 2531, Mansfield's Digest of the Statutes of Arkansas, 1884, in force in the Indian Territory at the date of the death of the said Charles Brown, which provides:

> In cases where the intestate shall die without descendants, if the estate came by the father, then it shall descend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be *a new acquisition it shall ascend to the father for his lifetime,* and then descend in remainder to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided.

The land allotted to Charles Brown, son of William Brown, was not an estate of inheritance, but *a new acquisition*, and his father took only a life estate therein. (*Kelly Heirs vs. McGuire*, 15 Ark., 555; 31 Ark., 103.)

In addition to the fact that the petitioner, William Brown, has no such interest in the estate of his deceased son, Charles Brown, as would give him the right to test the validity of section 22 of the act of April 26, 1906, the provision to which objection has been made has been repealed by section 9 of the act of May 27, 1908, *supra.*

However, an identical provision was sustained in the case of the *United States vs. Thurston Co., Nebr., et al.* (143 Fed. R., 287), where, after the delivery of patents conveying allotments, Congress, by a subsequent act, had, as in this case, provided that the heirs of deceased allottees might sell

and convey inherited lands, subject to the supervision of the Secretary of the Interior. The provision considered in that case was in the following language:

> But all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon alienation had been issued to the allottee.

Therefore, after having eliminated all of the questions raised, which are not properly before the court in this case, there remains for construction two sections, 19 and 20, of the act of April 26, 1906.

Cherokee Title Similar to Other Indian Titles.

The term "Indian country" has always been used to designate the territory within the limits of the United States to which the Indian title has not been extinguished. (*Bates vs. Clark*, 95 U. S., 204; *Ex parte Crow Dog*, 109 U. S., 556; *United States vs. Forty-three Gallons Whiskey*, 93 U. S., 188; *United States vs. Le Bris*, 121 U. S., 278.) While the title of the Indians has always been held by this court to be a right of occupancy only, with the fee in the United States, at a very early date it was also held that their title was one which should be respected by the courts until extinguished by proper authority. (*Fletcher vs. Peck*, 6 Cranch, 142; *Johnson vs. McIntosh*, 8 Wheat., 543.) More recently this court has declared that their right of occupancy should be respected until they have abandoned or voluntarily ceded their lands to the Government, or to individuals with the approval of the Government; and that the habits and customs of Indians and their means of securing a living should be considered, and the conclusion was reached that their hunting grounds were as much in their actual possession as the cultivated fields of the white man, and that their right

to their exclusive use, in their own way, should be as much respected until abandoned, ceded to the Government, or sold to individuals with the approval of the Government; and that, although the right of occupancy and possession attached itself to the fee without further grant when abandoned by the Indians, their right of occupancy was as sacred to them as the fee to the Government. (*Mitchel vs. United States,* 9 Pet., 711; *Clark vs. Smith,* 13 Pet., 195; *United States vs. Cook,* 19 Wall., 591; *Cherokee Nation vs. Georgia,* 5 Pet., 1; *Beecher vs. Wetherby,* 95 U. S., 517; *United States vs. Kagama,* 118 U. S., 37.)

The Cherokee tribe of Indians from time immemorial possessed, according to the usual Indian title by occupation, a large territory in the States of North Carolina and Georgia. The first treaty ever entered into between the Government and this tribe of Indians was on November 28, 1785 (7 Stat., 18), and was called the treaty of Hopewell. By the fourth article of this treaty a portion of the ancient possessions of the Cherokees was set apart by natural boundaries as their future hunting ground, and from that time to the present day the Cherokees have resided on lands set apart by the Government for their occupation.

After the treaty of Hopewell, owing to the rapid settlement of the country where the Indians were located, numerous other treaties were entered into between the Cherokees and the Government, changing the boundaries of their reservation and looking to their ultimate removal to lands west of the Mississippi River; and with this end in view, Congress on May 28, 1830 (4 Stat., 411), passed an act entitled "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the River Mississippi," the first section of which provides:

> That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the River Mis-

sissippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there; and to cause each of said districts to be so described by natural or artificial marks as to be easily distinguished from every other.

And section 3 provides:

> That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States, if the Indians become extinct or abandon the same.

The act of May 28, 1830, provided, as will be readily perceived, for an exchange of lands, the newly acquired lands to be held by exactly the same title as the lands surrendered, and under the same paramount authority of the Government of the United States. This policy of the Government was intended to operate to the advantage both of the Indians and the white settlers living adjacent to their new homes.

The Cherokees had for a long time been divided into two factions, one of which was desirous of engaging in the pursuits of agriculture and the assumption of civilization, while the other was equally desirous of adhering to its ancient traditions of securing a means of livelihood through the chase. So a treaty was entered into between the Govern-

ment and the Cherokee Nation on July 8, 1817 (7 Stat., 156), by which those Indians who desired to embrace civilization and an agricultural life should remain at their old homes, and those who wished to continue the lives of their forefathers and secure a living by hunting and fishing were to remove to what is now the State of Arkansas, where the Government agreed, upon their ceding their eastern lands, to give them lands in exchange. In pursuance of this agreement a large part of the Cherokees removed to Arkansas.

The advance of civilization having continued to encroach upon the lands of the Cherokees, both east and west of the Mississippi River, articles of a convention were entered into between the Government and the Cherokees west of the Mississippi River on May 28, 1828 (7 Stat., 311), the object of which was to secure to the Cherokee Indians living west of the Mississippi River a permanent home, to relieve them from intolerable conditions surrounding their residence in Arkansas, and to solve the problem of their removal when the Territory of Arkansas should become a State.

By article 2 of the convention the United States agreed to guarantee to the Cherokees forever 7,000,000 acres of land and an outlet to the west in what was afterwards Indian Territory, by natural boundaries.

The convention of May 28, 1828, was carried into effect by the treaty of February 14, 1833 (7 Stat., 414), which, after reciting the facts contained in the articles of convention, set out by natural boundaries the lands agreed to be guaranteed to the Cherokees west of the Mississippi River. These lands were situated in what was afterwards known as Indian Territory, now a part of the State of Oklahoma. The Cherokees on their part agreed to cede all their other lands to the Government.

Two years afterwards, as the Cherokees were anxious to make some arrangement with the Government by which the difficulties they experienced in their residence within

the central part of the United States under the jurisdiction and laws of State governments should be terminated, and with a view of reuniting their people east and west of the Mississippi River again, and securing a permane home for themselves and their posterity, where they could establish a government of their choice more in accordance with their views, habits, and conditions, entered into a treaty known as the treaty of New Echota, on December 29, 1835 (7 Stat., 478).

By article 2 of the treaty of New Echota the United States agreed to guarantee to the Cherokees the 7,000,000 acres of land and what is known as the "Cherokee Outlet," supposed to contain 6,574,135.14 acres, guaranteed by the treaty of May 14, 1833, and in consideration of the sum of $500,000 an additional 800,000 acres east of the Osage lands.

By article 3 the United States agreed that the lands ceded in article 2, by natural boundaries, should be included in one patent, executed to the Cherokee Nation of Indians by the President of the United States, according to the provisions of the act of May 28, 1830.

Accordingly, on December 31, 1838, a patent was executed by the President conveying to the Cherokee Nation the two tracts of land described in article 2 of the treaty of New Echota, containing 14,374,135.14 acres, subject to certain conditions, and among them "to the condition provided by the act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above-cited third article, and which condition is that the lands hereby granted shall revert to the United States if the Cherokee Nation becomes extinct or abandons the same" (Laws of the Cherokee Nation, 1892, pp. 415-424).

The title to the lands conveyed by the above patent to the Cherokee Nation was the ordinary title by which Indian lands are held, and was the same title by which the Cherokees held their original lands in North Carolina and Georgia. The ordinary Indian title we have already made clear by

references to numerous decisions of the Supreme Court. The act of May 28, 1830, *supra,* referred to frequently, provided for the *exchange* of lands with Indians residing in any of the States or Territories, and for their removal west of the Mississippi, the lands to be given in exchange by the United States being lands to which the Indian title had been extinguished. In this particular case the lands were situated west of the Mississippi River, in what was afterwards known as Indian Territory, and had been acquired from other Indians, and had never been in the possession of the Cherokees.

From its earliest dealings with Indian tribes the United States has followed the uniform policy of setting apart, out of lands ceded by various treaties, permanent homes for the tribes who have disposed of their lands. In the case of the Cherokees it was impossible to set apart a reservation out of lands to which the Indian title had been extinguished west of the Mississippi River, for the reason that the Cherokees have never been in possession; and, as was recognized by the act of 1830, it became necessary to convey the title in some other way, and the simplest way was that which was adopted—by patent.

The term "exchange," used in the act of May 28, 1830, shows a deliberate purpose in Congress to convey to the Cherokees lands in the Indian Territory, to be held by the same title as the lands had been held by them east of the Mississippi River. The word "exchange" as used in the act has a well settled legal meaning. Judge Blackstone says: "The estates exchanged must be equal in quantity, not of value, for that is immaterial, but of *interest;* as fee simple for fee simple, a lease for twenty years for a lease for twenty years, and the like" (2 Bl. Com., 323, and cases cited in the notes; see also 7 Barb., 638; 21 Wis., 123).

After the execution of the patent conveying the lands, as stated above, the Cherokee Nation removed to Indian Territory and settled thereon, and have continued to reside there

ever since, holding their tribal lands by the ordinary Indian title.

In the case of *United States vs. Rogers* (4 How., 567), the court held:

> The country in which the crime is charged to have been committed is a part of the territory of the United States and not within the limits of any particular State. It is true it is occupied by the Cherokee Indians. But it has been assigned to them by the United States as a place of domicile for the tribe and *they hold with the assent of the United States and under their authority.* (*United States vs. Kagama,* 118 U. S., 375; *Talton vs. Mayes,* 163 U. S., 376.)

After the removal of the Cherokee Indians to the Indian Territory they held by exactly the same title and under precisely the same administrative power of the United States as when they occupied their eastern lands, and the laws governing Indian tribes generally and the decisions of the courts upon the plenary power of Congress over Indian tribes applied to the Cherokee Nation with exactly the same force and effect.

We also call the attention of the court to the case of *Vanderbilt vs. Eidman* (196 U. S., 480, 501) to show that the title in question was a contingent interest and not a fee-simple title in the tribe. The question as to whether the tribal title under the patent was a fee simple came up directly in the case of the *Cherokee Nation vs. Hitchcock* (187 U. S., 294), where the position was taken by the nation that it held a fee-simple title, and that the act of 1898 was therefore invalid in its attempt to place the supervision of the leasing of their lands under the Secretary of the Interior, and the Supreme Court held on December 1, 1902, that notwithstanding the fact that the Indians had recently become citizens of the United States, the Government still

possessed the power of control over their property, which at that time was all tribal.

This case also establishes another fact, that this court has made no distinction between cases arising out of property rights in the Cherokee Nation and cases arising out of property rights in other Indian tribes.

The cases of the *Cherokee Nation vs. Hitchcock, supra*, and *Lone Wolf vs. Hitchcock* (187 U. S., 553) were argued together in the Court of Appeals of the District of Columbia, and the Lone Wolf case was decided first and the case of the Cherokee Nation was afterwards decided on the sole authority of the Lone Wolf case. Upon appeal the two cases were again argued together. The case of the *Cherokee Nation vs. Hitchcock* was decided on December 1, 1902, and the case of *Lone Wolf vs. Hitchcock* was decided on January 5, 1903, and the court there said:

> Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation vs. Hitchcock* (187 U. S., 294), decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property.

There are also a number of other Cherokee cases cited in this opinion.

This court in considering the Choctaw patent, in which much stronger language was used than in the Cherokee patent, said in the case of *Fleming et al. vs. McCurtain et al.* (215 U. S., 56-63):

> What we have said shows another sufficient answer to the plaintiffs' claim. They say and argue, as they must in order to make out their right to a distribution to themselves, that the Choctaws and Chickasaws no longer exist as nations. But if so, the grant also was at an end when the nations ceased to be, and it rested with the bounty of the United

States to decide what should be done with the land, except so far as it already had been decided by treaties or statutes upon which the plaintiffs do not and cannot rely. It is said that by Article 18, in case of any well-founded doubt as to the construction of the treaty, it is to be construed most favorably toward the Choctaws. But there is no well-founded doubt, except whether the construction contended for would have been regarded as favorable to the Choctaws, since it would have cut down the autonomy that the treaty so carefully expressed. See further, *Stephens vs. Cherokee Nation,* 174 U. S., 445, 488. *Cherokee Nation vs. Hitchcock,* 187 U. S., 294, 307. *Lone Wolf vs. Hitchcock,* 187 U. S., 553, 568.

The decision of this court in the case of *Holden vs. Joy* (17 Wall., pp. 211, 247) did not relate to the lands involved in this case.

Under the treaty of 1835 (7 Stat., 478-486) a large tract of land embracing over 13,000,000 acres was set apart to be conveyed by patent to the Cherokee Nation in exchange for their lands in North Carolina and Georgia. However, as doubt existed as to the sufficiency of those lands for the wants of the nation, it was further provided by the same article—article 2 of the treaty—that 800,000 acres of land, known as "neutral land," in Kansas to which the title of the Osage Indians had been extinguished, should be sold and conveyed to the Cherokee Nation by patent in fee simple in consideration of $500,000, to be taken from the Cherokee national fund. The third article of the treaty provided that the lands ceded by the treaty of 1833, including the Cherokee Outlet and those ceded by this treaty (the 800,000 acres), should all be included in one patent executed to the Cherokee Nation by the President according to the provisions of the act of May 28, 1830, *supra.*

THE PLENARY POWER OF CONGRESS OVER INDIAN TRIBES.

As the father is the natural guardian of his children, so is the Government of the United States the natural guardian of the Indians residing within its limits. A guardian is a temporary parent. In England the Lord Chancellor is the general guardian of all infants, while in the United States the court of probate or the court of chancery is the general guardian, the nominal guardian being merely an agent or officer of the court (1st Bl. Com., 463; 3 *Id.*, 141; 2 *Id.*, 461).

The guardian in the performance of his duties is required to exercise ordinary skill, prudence, and caution. He may lease his ward's real property and receive the rents and profits, and may sell his personal property without an order of court. Under an order of the proper court he may sell his real estate or may convert his personal property into real estate (*Lamar vs. Micou*, 112 U. S., 463-470; *Boz vs. Milliken*, 83 Ky., 638; *Eyster's Appeal*, 16 Pa., 372; *Thaw vs. Ritchie*, 136 U. S., 519; *Ex Parte Jewett*, 16 Ala., 409; *Smith vs. Sackett*, 10 Ill., 534; *Dodge vs. Cole*, 97 Ill., 338; *Thompson vs. Mebane*, 4 Heisk. (Tenn.), 370; *Lancaster vs. Lancaster*, 13 Lea (Tenn.), 132; *Hurt vs. Long*, 90 Tenn., 445).

The Government of the United States, acting through its legislative branch, is the guardian of the Indians within its limits, and its policies are carried into effect by the President, acting through the agency of the Secretary of the Interior. Everything that a guardian and a court of probate or a court of chancery may do for the ordinary white citizens may be done by Congress through the President for the Indians, so long as their tribal relations continue. (*Worcester vs. Georgia*, 6 Pet., 515; *Elk vs. Wilkins*, 112 U. S., 96; *United States vs. Kagama*, 118 U. S., 375; *Choctaw Nation vs. United States*, 119 U. S., 1; *Cherokee Nation vs. Southern Kan. Ry. Co.*, 135 U. S., 641; *Talton*

vs. Mayes, 163 U. S., 376; *Roff vs. Burney*, 168 U. S., 218; *Stephens vs. Cherokee Nation*, 174 U. S., 445; *Jones vs. Meehan*, 175 U. S., 1; *Lone Wolf vs. Hitchcock*, 187 U. S., 553; *United States vs. Rickert*, 188 U. S., 432; *United States* 73 Fed. R., 72; *Winters vs. United States*, 207 U. S., 564.)

The similarity of the guardianship of the General Government over Indian tribes to the care of the States for its incompetent citizens appears to have been recognized by the court in this case (Rec., p. 40).

> These acts of 1904 and 1906, and any other acts looking to the protection of the title of these full-blood Indians to the lands allotted to them, are analogous to the protection afforded by the States to the property of infants and others incompetent from any cause to manage their own affairs, though they be citizens of the United States.

Prior to 1871 the Government recognized Indian tribes as possessing some of the attributes of nations and entered into numerous treaties for the extinguishment of the title to tribal lands and for other purposes. On March 3, 1871 (16 Stat., 566; sec. 2079 Rev. Stat.), Congress provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by a treaty"; and as was said by this court in *In re Heff* (197 U. S., 488-509) "from that time on the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress which, for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life" (p. 498).

This policy has been justified and sustained by the courts upon the theory that the Indians of all tribes are wards of the United States, and, while recognized as distinct political communities, they are still considered as in a condition of

pupilage or dependency and subject to the paramount authority of the United States.

In the case of the *Cherokee Nation vs. Hitchcock* (187 U. S., 294), the court, referring to the case of *Stephens vs. Cherokee Nation* (*supra*), said:

> The plenary power or control by Congress over the Indian tribes and its undoubted power to legislate, as it has done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed;

and the opinion closes with the broad statement that—

> The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature; the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.

The case of the *Cherokee Nation vs. Hitchcock* followed the way clearly marked out by earlier decisions of this court. In the case of *Elk vs. Wilkins* (*supra*), the court said:

> But the question whether any Indian tribes, or members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself.

In the case of the *Cherokee Nation vs. Southern Kansas Railway Company* (*supra*), this court said:

> From the beginning of the Government to the present time they have been treated as "wards of the

> nation," "in a state of pupilage," "dependent political communities," holding such relations to the General Government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation vs. Georgia* (5 Peters, 1, 17), "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and domination of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility."

In the very important and far-reaching decision in the case of *Lone Wolf vs. Hitchcock* (*supra*), decided one month after the case of the *Cherokee Nation vs. Hitchcock*, this court said:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, *not subject to be controlled by the judicial department of the Government.* Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations (*Chinese Exclusion case*, 130 U. S., 581, 600), the legislative power might pass laws in conflict with treaties made with the Indians.

It will be observed that the act of Congress, the validity of which was in question in the Lone Wolf case, provided, in violation of existing treaties with the Indians, by direct legislation for the allotment of their lands, the sale of their surplus lands, and the disposition of the proceeds of such sales, upon the theory that they were wards of the United

States. In concluding its opinion the Court, upon the authority of *Stephens vs. Cherokee Nation* (*supra*), used language which would appear to indicate that there is no limit to the plenary power of Congress over Indian tribes and their property, and the courts of law have no jurisdiction to interfere with its exercise.

> We must presume that Congress acted in perfect good faith in the dealing with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary can not question or inquire into the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional and the demurrer to the bill was therefore rightly sustained.

When Congress extended the period of restrictions upon alienation of the lands of full-blood Cherokee Indians by the act of April 26, 1906 (*supra*), from five to twenty-five years on their surplus allotted lands, and from twenty-one to twenty-five years on their homesteads, it was acting well within its authority as guardian of the Indians; and as the tribal government of the Cherokee Nation still remains in existence, and its guardianship has never been abandoned by the Government, the courts have no power to question the authority of Congress to legislate for the benefit of its wards. As was said by the court in the case of *Heff*, *supra* (p. 499), the Government "may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*," but that it was "for Congress to determine when and how that relationship of guardianship shall be abandoned"; and that

"it is not within the power of courts to overrule the judgment of Congress." The court further said in substance that there existed a presumption that no radical departure from the policy of Congress was intended, and that the "courts may wisely insist that the purpose of Congress be made clear by its legislation."

Upon this subject the Court of Claims said (Rec., p. 35):

> Another principle of law equally well established is that every one who is competent and *sui juris* to act for himself may employ another to act for him; and if not competent and *sui juris* to act for himself, the Government, through its proper channel, may act for him to the end that he be protected in his rights of person and property.
>
> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government." (*Lone Wolf vs. Hitchcock*, 187 U. S., 553, 565, quoted in the case of *Matter of Heff*, 197 U. S., 488, 498.) But this question is too well established to require further comment.

The Cherokee Tribal Government Still in Existence and Recognized as Such.

It is a well-established fact that the tribal government of the Cherokee Nation is still recognized as an existing entity by the political department of the United States Government.

Section 63 of the act of July 1, 1902, *supra*, with a view to the complete settlement of the affairs of the Cherokee Nation by March 4, 1906, provided that "the tribal government of the Cherokee Nation shall not continue longer than March 4, 1906," but when that date arrived it was discovered that

the enrollment of the Cherokee citizens had not been completed, and that a large part of the tribal lands were still unalloted; therefore, Congress, by a joint resolution approved March 2, 1906 (34 Stat., 822), continued the tribal government in the following language:

> The tribal existence and present tribal government of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until the property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law.

Afterwards, by section 28 of the act of April 26, 1906, *supra*, the tribal government of the Cherokee Nation was continued still further or "until otherwise provided by law," and that no act of Congress has since been passed abolishing the tribal government; it must be considered for all purposes as still in existence and in full force and effect.

The Court of Claims also recognized the Cherokee Nation as a political community on October 7, 1904, when it was allowed to intervene in the case of the *Intermarried Whites vs. The United States* (40 C. Cls., 411), and by this court November 5, 1906 (203 U. S., 76).

The members of the Cherokee Nation were citizens of the United States when the allotment act of July 1, 1902, *supra*, was passed, imposing restrictions upon alienation, encumbrance, or leasing of individual allotments for the period of five years from the date of the issuance of the patents. They were also citizens and the government of the Cherokee Nation was as much of a government and had as much power on April 26, 1906, when the act extending the period of restrictions upon the alienation, encumbrance, or leasing of allotted lands was passed. At the present time even there are still lands of the Cherokee Nation unallotted and tribal

fund undistributed, for which lands patents must be issued, signed by the principal chief, as provided in section 58 of the act of July 1, 1902. It therefore follows there can be nothing in the argument of the petitioners that the tribal government of the Cherokee Nation was abolished when the act of July 1, 1902, was ratified and promulgated on August 7 and 12, 1902, respectively.

It is also strongly urged by the petitioners as an argument, the force of which we fail to appreciate, that the Cherokee Indians are now not only citizens of the United States, but also citizens of the State of Oklahoma. In view of this position of the petitioners, the attention of the court is invited to the historical fact that the State of Oklahoma was not admitted into the Union until November 16, 1907, whereas the act extending the period of restrictions, the validity of which is now in question, was passed April 26, 1906, the act of reference under which this suit was brought was passed March 1, 1907, and the suit itself was instituted on March 16, 1907.

The enabling act admitting Oklahoma into the Union as a State (34 Stat., 267), so far from disclosing an intention upon the part of Congress to emancipate the Cherokee Indians or their lands from governmental control, expressly reserves such control from the constitution of the new State. Section 1 provided:

> That nothing contained in the State constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished), or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.

And the third clause of section 3 of said act provided.

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

The Court of Claims in considering this case reached the conclusion that the tribal government of the Cherokee Nation still continues for all purposes under existing laws (Rec., p. 29), and in its opinion (Rec., p. 36) the court said:

> Referring to the acts of Congress continuing the tribal government, and the effect of those acts, the court in the case of *Muskrat et al. vs. United States* (44 C. Cls., 137), said:
>
> "Section 63 of the act of July 1, 1902, provides that 'the tribal government of the Cherokee Nation shall not continue longer than March 4, 1906;' but by joint resolution of Congress, March 2, 1905 (34 Stat. L., 822), the tribal existence and present tribal governments of the Cherokee Nation and other civilized tribes in the Indian Territory were 'continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law.' And thereafter, by section 28 of the act of April 26, 1906, the tribal existence and present tribal government of said nation was

with certain restrictions therein specified, 'continued in full force and effect for all purposes authorized by law until otherwise provided by law.'

"Therefore, in considering the questions involved, we shall assume the validity of those provisions continuing the tribal existence and tribal government of the Cherokee Nation in force and effect until all property of said nation shall have been distributed among the individual members thereof."

On the authority of those acts the court must assume the continued existence of the tribal government of the Cherokees. Nor will we analyze the acts to ascertain of how much authority the tribal government has been shorn. We are aware of no authority which makes power in the tribe to act essential to constitute tribal relations, though some power may be presumed.

As the United States is the self-constituted guardian of the Indians, with plenary authority over their tribal relation, it is for Congress and Congress alone to determine when that relation shall cease. In other words, when Congress by their legislation have declared that the tribal government of the Cherokees shall "continue in full force and effect for all purposes authorized by law until otherwise provided by law," the courts can not enter into the quantum of authority remaining in the tribe, and by construction defeat the will and purposes of Congress.

The Plenary Power of Congress Is Not Affected by the Citizenship of Indians.

The plenary power of Congress over Indian tribes was not affected by the act of March 3, 1901 (31 Stat., 1447), granting citizenship to the Indians of the Indian Territory in common with other Indians. Section 6 of the allotment act

of February 8, 1887 (24 Stat., 390), as amended, provides, *with the amendment of March 3, 1901, in italics:*

> And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provision of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, *and every Indian in the Indian Territory,* is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens.

The act of March 3, 1901, being but an amendment to the act of February 8, 1887, did not operate to change the status of the Indian tribes under that act, as will clearly appear by the construction placed upon it by numerous decisions of the courts.

The authority of Congress, so long as the tribal existence is recognized by the political department of the United States, is supreme over the lands of the tribes or of the individual Indians. (*Kansas Indians*, 5 Wall., 756, 757; *Jones vs. Meehan, supra.*)

The court soon after this, in passing upon the question of the relation of citizenship to the control over the property of individual Indians by Congress, in the case of *United States vs. Rickert* (*supra*), said:

> It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when

> these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. This is a political question which the courts may not determine.

In the case of *Farrell vs. The United States* (110 Fed. Rep., 942) it was held that—

> It is the settled rule of the judicial department of the Government, in ascertaining the relations of Indian tribes and their members to the nation, to follow the action of the legislative and executive departments, to which the determination of these questions has been especially intrusted. (*United States vs. Holliday*, 3 Wall., 407; *United States vs. Earl*, 17 Fed. Rep., 75, 78.)

The mere facts that the appellants, who are Indians, have taken allotments of land and have been made citizens of the United States do not operate of themselves, during their status of wardship, to limit or diminish the power of control and protection extended over them by the Government of the United States. The plenary power of Congress over the property of the Cherokee Indians has not been affected by the allotment act of July 1, 1902, nor has it been affected by the conveyance of allotments by certificates or patents subject to a restriction of five years upon alienation or encumbrance by said act. The administrative power of Congress over the property of the Cherokee Nation, whether held in common or by the individual, has never been surrendered, and until this has been done by Congress in clear and unmistakable language, such power must continue in full force and effect. (*Hitchcock vs. Bigboy*, 22 Appeal Cases, D. C., 275; *Beck vs. Flournoy Live Stock Co.*, 65 Fed. Rep., 30; *Pilgrim vs. Beck*, 69 Fed. Rep., 895; *United States vs. Flournoy Live Stock Co.*, 71 Fed. Rep., 576; *United States vs. Mullin*, 71 Fed. Rep., 682.)

The United States Circuit Court, in the case of *Ross vs. Eells* (56 Fed. Rep., 855), sustained the claim of the plaintiff that members of the Puyallup tribe in the State of Washington, to whom allotments had been made, and who became citizens of the United States and also of the State when admitted into the Union, had been emancipated from the control of the Government of the United States; but upon appeal to the Circuit Court of Appeals (64 Fed. Rep., 417) the decision of the lower court was reversed, the appellate court holding that—

> The act of February 8, 1887, which confers citizenship, clearly does not emancipate the Indians from all control or abolish the reservation.

And the court, citing with approval a Massachusetts case, said, "And it was held in *In re Coombs* (127 Mass., 278) that it was competent for the legislature to continue the guardianship by the State after they had been made citizens." This case was carried on appeal to the Supreme Court of the United States and the appeal was dismissed (163 U. S., 702). It unquestionably follows that if a State has the power to continue its guardianship over Indians after they have been made citizens, the United States, the natural guardians of the Indians, has the same power.

Nor is there anything in the decision in the *Heff case* (197 U. S., 488), upon which the petitioners place great reliance, in conflict with the other authorities which we have cited. This court in construing the Kickapoo treaty and its relation to the act of 1887, granting citizenship to Indian allottees, there held that Congress had the power, and by the language used, had relinquished guardianship over Indians, who had become citizens of the United States in so far as they became subject to the police regulations of the State; but the court at the same time was careful to point out the fact that their having been made citizens of the United States, and of the State in which they lived, in no way interfered

with the guardianship and control of their property rights by Congress; and said, in discussing the relationship of the Government to the Indians, that "it is not within the power of the courts to overrule the judgment of Congress."

This court in the case of *McKay vs. Kalyton* (204 U. S., 467) discussed the relation of citizenship to civil and political rights and to property rights, and reviewed the decisions in the cases of *In re Heff* and *The United States vs. Rickert*, and reached the conclusion that the property rights of tribal Indians remained unaffected by the question of citizenship.

The discussion of this entire question by the Supreme Court is also found in the case of *Dick vs. United States* (208 U. S., 340), decided on February 24, 1908.

The most recent discussion of this entire subject in which this court has reviewed the cases of *Rickert, Heff, McKay vs. Kalyton*, and others, is found in the case of the *United States vs. Celestine* (215 U. S., 278-291), in which the court has used this significant language:

> The act of May 8, 1906, c. 2348, 34 Stat., 182, extending to the expiration of the trust period the time when the allottees of the act of 1887 shall be subject to State laws, is worthy of note as suggesting that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty.

Most cogent of all reasons, in the face of existing conditions, there could have been no intention upon the part of Congress to emancipate the members of the Five Civilized Tribes from control and supervision by the act of March 3, 1901, *supra*, for their citizenship rolls had been commenced but a short time before, none of their tribal lands had been allotted, they were not within the boundaries of any State, and therefore not subject to the jurisdiction of any State court, but were controlled exclusively by acts of Congress, under the supervision of the Department of the Interior and

the jurisdiction of the courts of the United States provided by Congress for the Indian Territory.

The Court of Claims, in discussing the effect of citizenship upon the status of these Indians (Rec., pp. 36 and 37), said:

> In the case of *Matter of Heff, supra* (p. 499), the court said:
>
> "Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end."

On the authority of that case the claimants contend that by virtue of the act of March 3, 1901, declaring Cherokee citizens to be citizens of the United States, Congress terminated the relation of guardian and ward, thereby investing them with full power and authority as other citizens of the United States over the control of their property.

In the case of *Cherokee Nation vs. Hitchcock, supra* (at p. 309), being an action to enjoin the

Secretary of the Interior, under section 13 of the act of June 28, 1898 (30 Stat. L., 495), from leasing oil lands held for the benefit of said nation, the court said: "There is no question involved in this case as to the taking of property; the authority which it proposes to exercise by virtue of the act of 1898 has relation merely to the control and development of tribal property, which still remains subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

If citizenship may be conferred upon Indians while in tribal relations without affecting the administrative control of their tribal property, it follows that their communal rights in such property are not thereby removed from the control of Congress.

The attention of the court is called to the fact that the decision in the case of *Cherokee Nation vs. Hitchcock, supra*, referred to by the Court of Claims, was decided on December 1, 1902, after the passage of the acts of March 3, 1901, granting citizenship to the Indians in Indian Territory, and the allotment act of July 1, 1902.

The Allotment Act of July 1, 1902 (32 Stat., 716), and the Allotments Thereunder do not Affect the Control of Congress Over the Disposition and Management of Such Allotted Lands.

The appellants in this case have taken the position that the allotment act of July 1, 1902, was an agreement between the Cherokee Nation and the United States by virtue of which the Cherokee people acquired vested rights in the tribal lands and funds of the Cherokee Nation that could not be impaired or destroyed by subsequent legislation, and, ignoring the guardianship of the United States, they base

their contention upon the erroneous assumption that the citizens of the Cherokee Nation are persons *sui juris*. Whether the appellants rely, to sustain their position, upon the provision of section 10 of the first article of the Constitution, which declares that "no State shall pass any law impairing the obligation of contracts," or that provision of the fifth amendment to the Constitution which declares that "no person shall be deprived of life, liberty, or property without due process of law," is not perfectly clear.

Inasmuch as the prohibition against the impairment of contracts is restricted to States, the appellants appear to have abandoned that provision and devoted their argument, if it may be so termed, to the destruction of rights acquired under the allotment act of July, 1902, by the act of April 26, 1906, *supra*, the alleged destruction of vested rights being the extension of the restrictions upon alienation and leasing of the lands of full-bloods from five to twenty-five years on their surplus lands and from twenty-one to twenty-five on their homesteads.

The right to alienate allotted tribal lands is not a vested right during the existence of the tribal government. Under State laws a minor or other incompetent person may have a fee simple title to lands, but have no power to alienate them. The laws of the different nations of the world and States of the Union differ as to the time when a minor, more particularly a female, shall become of age and competent to manage his or her own affairs. In some States minors become of age at 18 years; in others they do not reach their majority until they have arrived at the age of 21. This being true, if a minor should, under existing State laws, be entitled to come into control of his property at the age of 18, could the authority of the State legislature to extend the period of his minority until he reaches the age of 21 be questioned? The answer is easy, if the law of the State in which he resides does not permit a minor to alienate his lands until he becomes of age, and the law is afterwards amended so as to

increase the age at which he shall reach his majority, it is very clear that the validity of the amendment can not be questioned upon the ground that the minor had been deprived of a vested interest in his lands.

Even among white persons who have never been under the guardianship of the United States or the State in which they live, if found incompetent either as a class or as individuals they may be placed under the care and supervision of a trustee by special act of the legislature of the State where such class or individuals reside. In the case of *Rice vs. Parkman* (16 Mass., 326), which has been extensively quoted by Judge Cooley in his work on Constitutional Limitations (pp. 117, 118), there was a statute already in force which granted to the courts the authority to order the sale of the lands of minors. Notwithstanding this act, however, the legislature of the State passed a special statute empowering the father of certain minors, as guardian for them, after giving bond to the judge of probate, to sell and convey their lands, and put the proceeds at interest on good security for the benefit of such minors. The sale was made, and after the children became of age they brought suit against the party claiming under the sale, upon the ground that the act was void. The validity of the statute was upheld and the court in an able and exhaustive opinion, which has been largely quoted by Judge Cooley, said among other things:

> This power must rest in the legislature in this Commonwealth; *that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.*

Judge Cooley has also quoted a paragraph from the opinion in the case of *Cochran vs. Van Surlay* (20 Wend., 365, 373), which we think peculiarly appropriate to the conditions existing in this case:

> A similar statute was sustained by the Court for the Correction of Errors in New York. "It is clearly,"

> says the chancellor, "within the powers of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the *superintendence, disposition, and management of the property and effects* of infants, lunatics, *and other persons who are incapable of managing their own affairs*" (*id.*, p. 120).

However, as we have already stated, it is not necessary that people should be Indians in order to entitle them to the supervision and protection of the legislature, but any person, or class of persons, who are not competent to manage their own affairs may be protected by the legislatures of the different States, even though there are general provisions upon the statute books which place upon the courts the same duties. It may also be doubted whether there is such a thing as the absolute ownership of property, free and independent in all cases from legislative action.

The law against perpetuity, in order to prevent a man from tying up his property indefinitely, provides that the testator may not devise his real estate beyond a life or lives in being and twenty-one years after, and in many jurisdictions it has been provided by statute that where testators have intentionally omitted their children from the benefits of their wills, the said children may come in for their full share of the estate after the death of such testator. (Amer. & Eng. Enc. of Law, 2d ed., vol. 30, p. 614, and authorities cited.) Provisions of this nature are all more or less interferences with the power of disposition of owners over their property, and the same may be said of the various statutes of limitation that the different States of the Union have in force, which, on the ground of public policy, bar an owner from the recovery of his property after the lapse of a certain time.

In the case of *The United States vs. Flournoy Live Stock and Real Estate Company* (69 Fed. Rep., 891) the claim

was made that as the Indian to whom the land had been allotted had become a citizen of the United States he ceased to be a ward of the Government, and that citizenship in the United States was inconsistent with the prohibition upon the alienation of his land; but the court said that—

> The right to alienate lands is denied to minors, and yet, during their minority they may be citizens of the United States, with all the privileges and rights conferred thereby.

The Supreme Court of the District of Columbia, in the case of *Hitchcock vs. United States ex rel. Big Boy* (22 App. D. C., 275), in discussing the right of the Government to supervise the disposition of the proceeds derived from the sale of allotted lands, said:

> It is of daily experience that in the matter of wills, marriage settlements, deeds of trust, and other similar arrangements, property is tied up and the right of alienation and disposal of it is restricted; and yet it has never been supposed that thereby the right of citizenship of the grantee or beneficiary is impaired. The provision made in the present and other similar cases for those who are or have been wards of the Government of the United States are analogous to ordinary trusts wherein it is sought, by restricting the right of disposition, to guard the beneficiaries against the results of their own improvidence; and we fail to find in either any impairment of the right of citizenship.

And further on in its opinion in the same case the court said:

> But when the United States, as guardian of the Indians, collectively and individually, seeks to secure any specified property to them in such manner

> that they shall not improvidently squander it, we see no reason why the United States may not limit their own grant as they see proper. We see no reason why they might not have done this with white settlers on the national domain, if they had deemed it expedient to do so. The matter of citizenship is an entirely extraneous thing, and has nothing whatever to do with the case. The question is whether the United States have restricted, and how far they have restricted, the use of the property which they have themselves granted.

The Government of the United States, as shown by numerous decisions of this court, is the guardian of its Indians, and Congress has, therefore, the power to advance the age, or declare the period of time, when these wards of the Government may attain their majority and become *sui juris*. Congress has this power and its judgment cannot be questioned by the courts of law (*Cherokee Nation vs. Hitchcock, supra*).

So far as full-blood Cherokees are concerned, the act of July 1, 1902, and the subsequent allotment of tribal lands in severalty were forced upon them against their will and active opposition, for they have always been strongly in favor of maintaining the Cherokee tribal government and holding their lands and other property in common.

In the *Intermarried Whites cases* (203 U. S., 76) the Supreme Court held that the act of July 1, 1902, had been ratified by the votes of white persons who had intermarried with Cherokee citizens, and that they could not take advantage of the act for that reason. The court further said, speaking of the act itself, that—

> Counsel for claimants speak of the act of 1902 as a "treaty," but it is only an act of Congress, and can have no greater effect.

Of the position taken by the full-bloods towards the act of 1902, the Court of Claims has this to say (Rec., pp. 38 and 39):

> But, independent of the findings, the court will take judicial notice of the Indians as wards of the nation and their consequent dependence upon the Government as their guardian. The native Cherokees were even opposed to the allotment act of 1902, preferring to continue their tribal relations and the communal ownership of the lands. This is shown in the *Cherokee Intermarried Whites Case* (203 U. S., 76, 93), where the court, after designating said allotment act as an act of Congress and not a treaty, said: "It is a singular commentary on the situation that the majority of the native Cherokees voted against its acceptance, which was carried by the vote of the whites."

The effect of the allotment act of July 1, 1902, and the citizenship act of March 3, 1901, upon the plenary power of Congress over Indian lands and property has been finally settled, however, by this court in the case of *Cherokee Nation vs. Hitchcock* (*supra*), decided on December 1, 1902, where it was held that the granting of citizenship to the Indians in Indian Territory *did not emancipate the Cherokee Indians from the control of the Government of the United States.*

Even had the act of July 1, 1902, been, instead of an ordinary act of Congress, a treaty it would have been subject to repeal or amendment by subsequent acts of Congress, for, as was said in the case of *Thomas vs. Gay* (169 U. S., 264):

> It is well settled that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the Government.

See also *Cherokee Tobacco case* (11 Wall., 621) and *Lone Wolf vs. Hitchcock, supra.*

Therefore, it follows that so long as the tribal relations of the Indians continue there can be no vested right of alienation in allottees which Congress may not by a subsequent act either further restrict or remove entirely, and the courts of law may not inquire into the motives which actuated Congress in enacting such legislation.

The Act of April 26, 1906 (34 Stat., 137), Was Passed for the Further Protection of the Indians, and Does not Divest Vested Rights.

In order to clearly comprehend the general aim and purpose of Congress in the enactment of sections 19, 20, and 22 of the Act of April 26, 1906, it becomes necessary to understand the existing conditions and the evils intended to be remedied in Indian Territory at the time of the passage of the act.

The Cherokee full bloods still clung to their ancient traditions and were intensely hostile to the new order of things. They were desirous of maintaining their old tribal relations and holding their lands in common as they had always done; but while opposed to allotments in severalty, when, however, the policy of the Government became an accomplished fact, and the certificates of allotment or patents were delivered to them, they wished to be surrounded by as many safeguards as possible. They realized their lack of education, experience, and business capacity, and their total inability to cope with their white and half-breed neighbors, and for these and other reasons they desired the prohibition upon the alienation of their allotments to remain in force. They were aware that whenever Congress had by special legislation removed the restrictions upon the alienation of the lands of full-bloods, they had become the victims of designing land sharks, and had sold their allotments for grossly inadequate prices. They were also aware of the fact

that notwithstanding the prohibition upon alienation imposed by the act of July 1, 1902, as to the validity of which there is no question in this case, a large proportion of the full-bloods had been induced to sell or encumber their lands by deeds, mortgages, and agreements to sell, conditioned to pay certain amounts, also grossly inadequate, whenever a valid title could be given by the grantors; and these instruments, although nothing had been paid by the grantees, had been placed upon record (Rec., p. 28).

It has, we believe, been made clear under the preceding heading that so long as the tribal relations continue there can be no vested right of alienation which Congress may not by subsequent act limit, modify, or restrict. Therefore, after a thorough and complete investigation of conditions existing among the full-bloods and their capacity for assuming complete control and disposition of their lands, the act of April 26, 1906, was passed. Congress recognized its duty in the premises and enacted legislation necessary for the protection of its helpless wards, who were still in a state of pupilage and dependence.

Under the act of July 1, 1902, patents have been, and are still being, delivered to full-blood Cherokees by the Government, which upon their face are unconditional grants of their allotments, but which are nevertheless controlled by the restrictions upon alienation and leasing contained in said act. Before the expiration of the period within which they could not alienate any of their lands, Congress, continuing its control over said lands, by the act of April 26, 1906, extended the period of limitation within which such full-bloods could not alienate their lands to twenty-five years.

It has always been recognized by the courts, as a principle of law, that wherever there is a duty of protection it carries with it the power to protect.

In the case of *The United States vs. Kagama* (*supra*), this court, after reviewing at great length the relations between the Government and the Indian tribes, said:

> From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, *there arises the duty of protection, and with it the power.* This has always been recognized by the Executive and by Congress and by this court whenever the question has been raised.

The decision in the case of *The United States vs. Kagama* was discussed and reaffirmed by this court in the case of *The United States vs. Rickert, supra.*

In the case of *The United States vs. Thurston County, Nebr.* (143 Fed. Rep., 287), decided on March 21, 1906, the court, in an exhaustive opinion also reviewing the relations between the Indian tribes and the Government of the United States and the power of the Government to protect its Indians, said:

> They are still members of their tribes and of an inferior and dependent race, of which the Supreme Court has said that "from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress and by this court, whenever the question has arisen."

In the case of *The United States vs. Mullin* (71 Fed. R. 682), the duty of the Government to protect its Indians who had received allotments in severalty and become citizens of the United States was discussed, and the court held that the duty of protection still remained with the Government.

The reasons which influenced Congress, in placing restrictions upon the power of alienation by Indians who had received their allotments in severalty, has been stated with

great clearness and force in the case of *Beck vs. Flournoy Co., supra:*

> These limitations upon the power of the Indians to sell or make contracts respecting land that might be set apart to them for their individual use and benefit were imposed to protect them from the greed and superior intelligence of the white man. Congress well knew that if these wards of the nation were placed in possession of real estate, and were given capacity to sell or lease the same, or to make contracts with white men with reference thereto, they would soon be deprived of their several holdings; and that, instead of adopting the customs and habits of civilized life and becoming self-supporting, they would speedily waste their substance and very likely become paupers. The motive that actuated the lawmaker in depriving the Indians of the power of alienation is so obvious, and the language of the statute in that behalf is so plain, as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatsoever in lands situated within Indian reservations that might be allotted to Indians.

In the case of *West vs. Hitchcock* (205 U. S., 80) in which the relation between the Indian tribes to the United States, the power of the Government over them, and its duty to protect them were discussed, the court said, in speaking of two sections of the Revised Statutes (441-463):

> We should hesitate a good deal, especially in view of the long-estblished practice of the Department, before saying that this language was not broad enough to warrant a regulation made for the welfare of the rather helpless people concerned. The power of Congress is not doubted. The Indians have been

treated as wards of the nation. Such supervision was necessary and has been exercised.

The appellants have attacked the validity of the act of April 26, 1906, upon the ground that it takes private property without due process of law. The meaning of the phrase "due process of law" has never been made perfectly clear by text writers, nor have they ever attempted a concise or exact definition, but have contented themselves with an attempt to fix its meaning by the method of inclusion and exclusion. It is well settled, however, that "due process of law" is not restricted to the decisions of courts of law, but is equally applicable to legislative acts.

Congress has, however, by the act of April 26, 1906, deprived its wards of nothing which they already possessed. The Government has reaped no advantages from the restrictions upon alienation or leasing of lands except to prevent the full-bloods from becoming paupers and a charge upon the public. Congress has always possessed the power of control over Indian tribes, and the management of their business affairs, but since 1871 this control and management has been carried on by direct legislation, and this course of procedure with regard to Indian tribes and individuals may be termed "due process of law." Therefore, the act in question is part and parcel of the system built up by the Government for the management of Indian affairs, and the act itself, in surrounding the wards of the Government with additional safeguards to prevent them from becoming charges upon the public, has pursued its settled policy of protection through the regular and usual channels of legislation, and it may be said by "due process of law." Congress in extending the period of restrictions upon alienation or leasing of the lands of full-bloods did what, in its judgment, was best for them and what they themselves wanted. There can be, therefore, from the very nature of the case, no question raised of the taking of property without due process of

law; for the propriety of the position taken by defendants has time and again been recognized by the courts, which have uniformly sustained acts of Congress imposing restrictions where the intention to do so was free from ambiguity.

Upon the duty of protection the Court of Claims has this to say (Rec., p. 39):

> The full-bloods or native Cherokees are uneducated and unable to speak the English language, and without the protection of the Government it is manifest that they are liable to lose the lands allotted to them. The restrictions placed upon their lands against alienation, incumbrance, and leasing will be removed when the Government is satisfied that it can withdraw its protection without detriment to the interests of the owners. This is evidenced by the act of May 27, 1908 (35 Stat. L., 312), whereby the acts of 1902 and 1906 have been materially changed and modified, as therein shown.
>
> By section 19 of the act of 1906 the lands upon which the restrictions were imposed are free from taxation so long as held by the original allottees, and this is a benefit and protection and not a detriment to the owner.
>
> As was said by the court in the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553, 567), quoting from the case of *United States vs. Kagama* (118 U. S., 375, 383), "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on

all the tribes." So here the exercise of the power of government is necessary to the protection of the less civilized, the weak and the unlettered full-blood Indians, against designing men, as well as for the safety of those with whom they dwell. This does not involve a taking of the property of the full-bloods, as the acts in controversy simply subject their allotments to administrative control for their sole benefit until they are *sui juris* and competent to protect themselves.

It would be strange indeed if the Government, in dealing with its wards, desiring to aid them in taking an advance step in civilization by conferring upon them citizenship and the right to hold real estate in severalty, could not invoke its own power while tribal relation exists to protect them in the rights thus conferred. We think the power to do so rests in Congress, notwithstanding the citizenship conferred upon the Indians and the allotment of their lands in severalty.

The acts in question seek the protection of those most in need thereof, and they wisely consent to the administrative shield. If they consent, though by the jurisdictional act some of their number are designated to maintain this action, who will be harmed or what principle of law will be violated in holding the acts valid while tribal relations are recognized by Congress?

While the estate of the Cherokee Nation was in process of settlement by the United States, as the guardian of the tribe, it became necessary while allotments were being made, in order to protect the trust estate, to segregate a large class of Cherokee citizens who were unable to protect their allotments by extending the period of inalienability as to their lands, and this was done by the act of April 26, 1906. Not for any selfish advantage to the United States, not to rob them

of the fruits or enjoyment of their allotments, but in order to conserve the interests of the full-bloods and prevent them from becoming a charge upon the United States.

This legislation of Congress was not a taking within the meaning of the fifth amendment to the Constitution; it was simply a control of the property of incompetent Indians for their own protection, and the Supreme Court, in the case of the *Cherokee Nation vs. Hitchcock, supra,* said such a *control* was not *a taking* within the meaning of the Constitution. In addition to this, it may be said that under all the authorities it is well settled that a taking of property by due process of law may be by legislation, as well as by judgments of courts of law. Since 1871, when Congress changed its policy of dealing with Indians from the making of treaties and agreements to control of their property by direct legislation, the Cherokee Nation, as well as all other Indian tribes, have been under the direct and immediate control of Congress, and with this control the courts have uniformly refused to interfere. Legislation by Congress is undoubtedly due process of law so far as the property of Indian tribes is concerned, and the courts will only take jurisdiction in order to interpret those laws. Where they are as free from ambiguity as the acts in question the courts have uniformly refused to take jurisdiction.

On March 21, 1906, the United States Circuit Court of Appeals, in the case of *The United States against Thurston County, Nebr., supra,* held that the fact of Indian allottees becoming citizens of the United States and the State of Nebraska did not in any wise affect the power or duty of the Government to protect their property interests. The court said:

> Their civil and political status, however, does not condition the power, authority, or duty of the United States to exert its powers of Government to control their property.

And to sustain this position the court cited the case of *Wallace vs. Adams* (143 Fed. R., 716; 204 U. S., 415), a Choctaw case, in which the title to the lands was identical with that of the Cherokees.

In the case of *Eells vs. Ross, supra,* where the effect of the act of February 8, 1887, *supra,* conferring citizenship upon Indians who had received their allotments was exhaustively discussed, the court said:

> If it is for the interest of the Indians or of commerce to remove the restraints on alienation, Congress will, no doubt, do so, if applied to, and in the latter case it will be enabled to provide for the interests of the Indians better than they have seemed to have provided for themselves in the contract with the appellee.

In the case of the *National Bank of Commerce vs. Anderson* (147 Fed. R., 87) the court said:

> The granting of citizenship does not affect the character of the title to land allotted to the Indian, nor is the restriction against alienation inconsistent with citizenship.

In the case of *Jones vs. Meehan, supra,* the court, after discussing the relation of Indian tribes to the Government, held that certain land reserved to an Indian by an act of Congress was alienable by his heirs, after his death, for the reason that—

> The inference appears to us to be irresistible, that Congress did not intend that there should thenceforth be any general restriction upon the alienation by individual Indians of sections of land reserved to them, respectively, by a treaty with the United States.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 331.

WILLIAM BROWN AND LEVI B. GRITTS, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER CHEROKEE CITIZENS HAVING LIKE INTEREST IN THE PROPERTY ALLOTTED UNDER THE ACT OF JULY 1, 1902, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE CHEROKEE NATION.

Statement of the Case.

According to the opinion of the Court of Claims, the importance of this case can hardly be overstated. It involves the question of the power of Congress, where allotments to tribal Indians have been and are still being made in severalty (Rec., p. 28), with restrictions upon alienation, encumbrance, or leasing, to subsequently, during the existence of the original period of restrictions and during the existence

of the Indian Territory, extend the period of such restrictions. Its decision will affect not only the allotments of 8,689 Cherokee full-bloods directly concerned in this case, but indirectly all of the allotments of full-bloods of the Five Civilized Tribes of Oklahoma, numbering perhaps 30,000 persons (Rec., p. 30).

The act of July 1, 1902 (32 Stat., 716), entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," contains the following provisions relating to the allotment of Cherokee tribal lands:

> SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be non-taxable and shall not be liable for any debt contracted by the owner thereof while so held by him.
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> SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.
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> SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.
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> SEC. 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of

said Commission to make said selection and designation.

SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided,* That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

SEC. 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year

for grazing purposes and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands.

The act of July 1, 1902, was ratified, in accordance with its provisions, on August 7, 1902 (Rec., p. 20).

In accordance with the provisions of this act the Commission to the Five Civilized Tribes began the allotment of tribal lands to those citizens whose enrollments had been approved on the first Monday of January, 1903, and continued said allotment to those citizens whose enrollments had been from time to time finally approved by the Secretary of the Interior under said act and subsequent acts of Congress, and is still engaged in the allotment of the tribal lands. Patents have been and are still being issued from time to time, in accordance with sections 58 to 62 of said act, to those citizens who have received certificates of allotment.

On April 26, 1906, an act was passed by Congress, entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes" (34 Stat., 137), which contained the follow-

ing provisions affecting the allotment of Cherokee lands, commonly known as the "McCumber Amendment":

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before, the removal of restrictions be, and the same is hereby, declared void: *Provided*

further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

SEC. 20. That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior, and shall be absolutely void and of no effect without such approval: *Provided,* That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent, and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

On December 21, 1906, the petitioner, William Brown, filed in the Supreme Court of the District of Columbia a bill attacking the validity of the act of April 26, 1906, *supra*, and praying an injunction upon the ground that the act had been passed in violation of the Constitution of the United States; but, before the hearing upon the bill and answer, Congress passed an act on March 1, 1907, conferring jurisdiction upon this court to hear and determine the validity of the act of April 26, 1906 (Rec., p. 28).

The authority for the institution of this suit, in this court, is found in an item of the Indian appropriation act of March 1, 1907 (34 Stat., 1015, 1028), which reads as follows:

> That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled "An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

> And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal by either party to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.
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> The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant; and for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.
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> Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of the said acts, authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two.

In pursuance of the provision of the jurisdictional act, which required the persons named as plaintiffs to file their petitions in this court prior to September 1, 1907, the plaintiffs, on March 16, 1907, filed their petition (Rec., pp. 1-12), in which they attack not only the validity of the act of April 26, 1906, but also the validity of the act of March 11, 1904 (32 Stat., 65), which reads as follows:

> That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation,

through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided*, That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be construed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company: *Provided further*, That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements cannot be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or territorial taxation

the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and care: *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper.

On March 26, 1908, the plaintiffs filed an amended petition in which, for the first time, they attack the validity of a provision of the Indian appropriation act of March 1, 1907 (34 Stat., 1025), the same act which carried the jurisdictional act under which this suit was brought (Rec., pp. 13, 14).

The provision in question reads as follows:

> For clerical work and labor connected with the leasing of Creek and Cherokee lands, for mineral and other purposes, and the leasing of lands of full-blood Indians, under the act of April 26, 1906, thirty thousand dollars; for clerical work and labor connected with the sale of inherited and other lands, Five Civilized Tribes, thirty thousand dollars; in all, sixty thousand dollars: *Provided*, That the sums so expended shall be reimbursable out of the proceeds of such land sales and leases, and shall be equitably apportioned by the Secretary of the Interior from the moneys collected from such sales and leases.

The $30,000 provided by the above act for the expenses of leasing Creek and Cherokee land, for mineral and other purposes, and the leasing of the lands of full-bloods have been reimbursed, and the regulations issued by the Secretary of the Interior in pursuance of the act have been revoked (Rec., pp. 28, 29).

The enrolled full-blood Cherokee citizens to whom lands in the Cherokee Nation have been and are still being allotted are, in the main, in favor of the extension of the period of restriction upon alienation, encumbrance, or leasing of their lands; and they are also in favor of the supervision of the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands, as provided in the acts complained of, as they are uneducated and unable to speak the English language and never before owned alienable lands, and without governmental supervision are incompetent to represent and protect themselves in the sale or leasing of their allotted lands (Rec., p. 28).

Prior to the passage of the act of April 26, 1906, *supra*, many full-blood Cherokee citizens had been induced by designing persons to execute deeds of their allotted lands and contracts to sell, and to otherwise encumber their allotments in violation of the provisions of the act of July 1, 1902,

supra, at grossly inadequate compensation, the execution of such deeds, contracts, and mortgages having been made contingent upon the delivery of valid titles to the purchaser or mortgagee, as the case might be. Since the passage of the act of April 26, 1906, large numbers of such deeds, contracts to sell, and mortgages of the allotted lands have been filed almost daily in the offices of the recorders of deeds in the counties of Oklahoma where the land is situated, and suits were brought by the United States embracing 25,338 transactions in the United States courts of the State of Oklahoma to cacel such deeds, contracts and mortgages upon the ground that they are a cloud upon the title of such Indians to the allotments (Rec., p. 28).

These suits were argued in the United States courts of Oklahoma, where a decision was rendered in favor of the defendants and against the Government. The suits were afterwards appealed to the United States Circuit Court of Appeals for the Eighth Circuit, where they were decided in favor of the Government on June 8, 1910 (United States *vs.* Allen *et al.* (179 Fed. R., 13).

The petitioners in this case have never been authorized either by the Cherokee Nation or any enrolled citizens thereof to institute this suit. The restrictions upon the alienation of a part of the surplus lands of the petitioner Brown have been removed, and upon all of the surplus lands of the petitioner Gritts (Rec., p. 27).

Since the suit was instituted, and before its decision by the Court of Claims, an act was passed by Congress, entitled "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," approved May 27, 1908 (35 Stat., 312, 316), by which both the acts of July 1, 1902, and April 26, 1906, have been materially changed and amended, the result of which will be that the decision of this case will not only affect the validity of the act of April 26, 1906, but also the validity of the act of May 27, 1908, several sections of which, peculiarly applicable to this case, read as follows:

That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or incumbrances, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood, including minors, shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three, inclusive, of an act entitled "An ac-

to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee, if an adult, or by guardian or curator under order of the proper probate court, if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided* That leases of restricted lands for oil, gas, or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further*, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

SEC. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subject or held liable to any form of personal claim or demand against the allottees arising or existing prior to the removal of restrictions other than contracts heretofore expressly permitted by law.

SEC. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made prior or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act, shall be absolutely null and void.

Section 6, after providing that "the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma," provides, among other things, for the appointment by the Secretary of the Interior, under certain rules and regulations to be prescribed by him, of local representatives in the State of Oklahoma, who shall be citizens of that State or now domiciled therein,

> to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this act or any other act of Congress, and to take all steps necessary to assist said

allottees in acquiring and retaining possession of their restricted lands.

By the same section Congress appropriated $50,000 to pay the necessary expenses of such litigation.

SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further,* That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during the life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions; *Provided further,* That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

Congress also, by the act of June 25, 1910 (36 Stat., 703, 748), appropriated an additional sum of $50,000 for the

payment of the necessary expenses incident to any suits brought at the request of the Secretary of the Interior, referred to by section 6 of the act of May 27, 1908.

In addition to what has already been said, we wish to call the attention of the court to the fact that the tribal organization of the Cherokee Nation was intact at the date of the passage of the act of April 26, 1906, and is still in existence for all purposes (Rec., pp. 29 and 36).

At the hearing of this case before the Court of Claims the Cherokee Nation was allowed to intervene (Rec., p. 14), and was represented by its national counsel, who participated in the argument (Rec., p. 19).

The case was decided by the Court of Claims on February 8, 1909, and the petition dismissed (44 C. Cls., 283).

ARGUMENT.

The Act of April 26, 1906 (34 Stat., 137), is the Only Act to be Construed in This Case.

The jurisdictional act directs this court "to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two."

The action of Congress in referring these questions to the court arose out of the fact that three suits had been instituted in the Supreme Court of the District of Columbia to enjoin the Secretary of the Interior from carrying into effect the provisions of the act of April 26, 1906, and upon the author-

ity of *Binns vs. United States* (194 U. S., 486-496), the court may consider, in order to determine the questions involved, the reasons given by the chairman of the Judiciary Committee for referring the case to this court.

Mr. CLARK of Wyoming: I see indications that the Senator from New Jersey is going to interpose a point of order. I should like to make a statement before that is done.

Mr. KEAN: Certainly; I withhold the point of order.

Mr. CLARK of Wyoming: Mr. President, by way of explanation I will say that this amendment could perhaps if adopted go a long way toward settling some of the vexed questions of law about which we have been having some difficulty within the last two or three days, to wit, the constitutionality of the McCumber amendment and certain other provisions of the law which we passed to which the McCumber amendment was attached.

Laura Secondine, William Brown, David Muskrat, and others brought three suits which are now pending in the District of Columbia, testing the validity of these acts. To these suits demurrers were interposed by the Government of the United States. The condition of those suits now is that by stipulation further action is delayed until Congress shall have an opportunity to act upon this proposition. If this matter be referred to the Court of Claims, with instructions for speedy action and with opportunity for appeal to the Supreme Court of the United States, it is more than likely that very early action will be had upon those legal propositions.

In that view of the case, I think perhaps that while the amendment might be subject to a point of order as intimated, the benefit to be derived from it would so far outweigh that it ought to remain in the bill

But in discussing the title granted by Congress the court said:

> Title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation,

clearly showing that the court recognized the power of Congress to further restrict alienation.

The above quotation from the opinion in the case of *Jones vs. Meehan* was cited with approval, together with numerous other authorities, in the case of *Francis vs. Francis* (203 U. S., 233), decided December 6, 1906.

Wiggan vs. Conolly Decisive (163 U. S., 56).

In the case of *Wiggan vs. Conolly,* to which the attention of the court is particularly invited, the lands allotted to the Ottawa Indians residing in the State of Kansas, under the treaty of July 16, 1862 (12 Stat., 1237), were made inalienable until "the expiration of five years from the date of the ratification of this treaty," when the allottees should become citizens of the United States. They also became citizens of the State of Kansas at the same time. Esther Wilson, to whom land had been allotted under the treaty, and to whom a patent reciting the conditions of the treaty had been delivered on December 1, 1865, was a minor and a recognized and enrolled member of the Ottawa tribe. On February 23, 1867, prior to the expiration of the five-year limit upon alienation but subsequent to the delivery of the patent, another treaty was entered into extending the time when the allottees should become citizens of the United States two years, with a provision that all who desired to become citizens should make a declaration of their intention in the United States District Court. The treaty, as afterwards amended and finally ratified on October 14, 1868, provided that adults

and heads of families should receive patents in fee simple "so that they may sell their lands without restrictions." The guardian of Esther Wilson, under the order of the Probate Court of Franklin County, Kans., on October 26, 1872, sold her allotment to John Wiggan, from whom the appellants derived their title; the appellees were the heirs of Esther King, deceased. The Supreme Court said:

> It does not appear that the allottee in this case was the head of a family, and, according to the testimony, she was a minor. This treaty of 1867 introduced a new limitation upon the inalienability of lands patented to a minor allottee; that is, the limit of minority. And such limit must be applied to sales voluntary and involuntary, and cut off the right of a guardian to dispose of the estate. The fact that the patent to this allottee had already been issued did not abridge the right of the United States to add, with the consent of the tribe, a new limitation to the power of the individual Indian in respect to alienation. The land and the allottee were both still under the charge and care of the nation and the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge.

The court will, of course, observe that the treaties of 1862 and 1867, referred to in the case of *Wiggan vs. Conolly*, were entered into prior to the act of March 3, 1871, *supra*, by which Congress gave notice of its change of policy and its intention to thereafter deal with the Indian tribes by direct legislation instead of by treaty, since which time all of the decisions of the courts to which we have referred have sustained the plenary power of Congress over the Indian tribes and individuals, so long as the tribal relations continue, and have uniformly held that Congress may do by legislative enactment anything that it could have done prior

to that time by treaty. (*Lone Wolf vs. Hitchcock, supra.*)

Hence, it follows as a conclusion of law that Congress had the right, by the act of July 1, 1902, without the consent of the Cherokee people, to provide for the allotment of the Cherokee lands. The ratification by the Cherokee people added nothing to the effectiveness of the act, and Congress never intended that it should, but simply desired an expression of approval from the Cherokee people as a matter of policy and in order to conform in spirit to article 20 of the treaty of July 19, 1866, *supra,* which provided that the request for the allotment of their lands should originate with the Cherokee national council. The Supreme Court evidently understood the position of Congress upon this question when it said in the *Intermarried Whites cases, supra,* speaking of the act of July 1, 1902, "it is not a 'treaty,' but it is only an act of Congress and can have no greater effect." Therefore, if Congress had the power to pass the act of July 1, 1902, it unquestionably had the power also to pass the act of April 26, 1906, the validity of which is now before the court.

It is also equally clear that after the passage of the act of March 3, 1871, *supra,* Congress could, by direct legislation, and without an agreement with the Ottawa Indians, have enacted in identical language the provisions contained in the treaties of July 16, 1862, and February 23, 1867, construed in the case of *Wiggan vs. Conolly.* This was exactly what the Supreme Court in the case of *Lone Wolf vs. Hitchcock, supra,* held that Congress might do. Hence, it follows that if Congress had the power to enact such legislation for the Ottawa tribe it had the same power to enact it for the Cherokee Nation. The consent of the Ottawa tribe was unnessary and the consent of the Cherokee Nation was also unnecessary. The case of *Wiggan vs. Conolly* is almost identical with the case at bar. There a patent had been issued before the expiration of the period of restriction upon alienation, but that period as to minors was afterwards extended before the land had become alienable. In the case at

bar, allotments had been and were still being made, but none of the allotted lands had become alienable under the act of July 1, 1902, when the act extending the period of restrictions was passed.

In the case of *Wiggan vs. Conolly* Congress extended the period of restrictions upon alienation of the lands of minors. In the case at bar Congress, also recognizing the want of business capacity of the full-blood Cherokees, likewise extended the period of restriction upon alienation of their lands.

The record in this case shows that every full-blood Cherokee who has testified, including the petitioner Gritts himself, state that it is for the best interests of the full bloods that the restrictions upon the alienation of their lands should remain. They not only assent to the further protection afforded by the act of April 26, 1906, but they earnestly desire that the restrictions imposed by the act shall remain. All of the Cherokees who are concerned in the validity of this act are in favor of its provisions, and the equities are certainly as strong, if not stronger, than those in the case of *Wiggan vs. Conolly*. In that case Esther King and all others similarly situated were minors when the treaty of 1867 was entered into, and could not personally have consented to an extension of the period of restriction. In the case at bar the full-blood Cherokees, through lack of capacity, are regarded as minors, and they and their lands as subject to the paramount authority of Congress during the period of restriction upon the alienation of their allotted lands.

To recapitulate the points of similarity between the *Wiggan vs. Conolly* case and the case at bar:

(1) In that case the restrictive period was five years. It was the same in this case on the surplus lands of the allottees.

(2) In that case a patent was issued prior to the second act extending the restrictive period, and some patents had

been issued in this case prior to the act of Congress extending the restrictions.

(3) In that case the treaty extending the restrictive period was entered into before the expiration of the five years restrictive period, and in this case the act of Congress was enacted extending the restrictive period before the five years restrictive period had expired.

(4) In that case Esther Wilson, the allottee, was a minor and therefore incompetent to act for herself, and in this case the parties affected are full bloods, wards of the Government, admittedly incompetent and need the protection of the Government.

(5) In that case the extension of the restrictive period was for the protection of the Indians, and the same is true in this case, and the judgment of Congress cannot be controlled by the courts.

(6) In that case the consent of the tribe was given. In this case all the full bloods favor the extension of restrictions except the appellants, and they represent no one but themselves (Rec., pp. 27 and 28).

But appellants say that the extension of restrictions in that case was with the consent of the tribe. That is true, but we have invited attention to a number of decisions of this court rendered since the changed policy of the Government in 1871 toward Indian tribes, holding that Congress had the power to control the Indians and their property by direct legislation instead of by treaty (*Lone Wolf vs. Hitchcock*, 187 U. S., 555; *Cherokee Nation vs. Hitchcock*, 187 U. S., 294; *Stephens vs. Cherokee Nation*, 174 U. S., 445). As elsewhere pointed out, this court held in the *Intermarried White Case* (203 U. S., 76), that the act of July 1, 1902, was not a treaty, "but it is only an act of Congress and can have no greater effect."

In the case of the *United States vs. Allen et al.,* decided by the Circuit Court of Appeals, Eighth Circuit, June 8, 1910, the legislation in question in this case was exhaustively reviewed, the relation of the Five Civilized Tribes to the Government discussed, and numerous authorities cited. In that case the court held these acts of Congress, extending restrictions complained of in this case constitutional, and concludes its opinion in the following language:

> The whole scheme of allotment of lands in severalty to the Indians is an experiment. Congress, in the case of the Five Nations, has attempted to reserve to itself power to deal with the subject in the light of experience. If the plan proves a failure, after a fair trial, it would be disastrous, indeed, if the mere grant of citizenship to the Indian had placed him beyond the power of the Federal Government to adopt such measures for his welfare as experience should show to be necessary (179 Fed. R., 13).

In the case of *Laughton vs. Nadeau* (75 Fed. R., 789) a patent had been issued to a minor member of the Pottawatomie tribe of Indians, which on its face conveyed a fee-simple title to an allotment, which, although procured by fraud, the court held under the circumstances to be a valid conveyance of the allotment. The treaty of 1862 with the Pottawatomie Indians imposed restrictions upon the alienation of their allotted lands. Notwithstanding such restrictions the guardian of David Laughton, the minor, sold his allotment and paid over to him the proceeds of the sale. After the title to the lands had passed through several hands, and twenty-five years after the first sale by his guardian, Laughton, who had long since reached his majority, brought suit against his guardian, Nedeau, and the other grantees, for the removal of the cloud upon the title of his allotment, and the court held that the original and subsequent sales of the prop-

erty were void, and, upon the authority of *Wiggan vs. Conolly, supra,* and *Eells vs. Ross, supra,* said:

> No laches could be imputed to complainant while under disability as a tribal Indian. He and his lands were under the control of the Government.

In the case of *Starr vs. Campbell* (208 U. S., 527), this court held:

> The restrictions on the right of alienation of lands to be allotted in severalty under the Chippewa treaty of 1854 extend to the disposition of timber on the land as well as to the land itself; and the consent of the President to a contract for cutting timber does not end his control over the matter; he may put conditions upon the disposition of the proceeds.

And in its opinion, on page 533, the court said:

> It must at the outset be kept in mind that a policy of control over the Indians has always been observed by the Government. The many exercises of the policy which have been sustained by this court we need not stop to comment on.

And the court, in the case of *Thomas vs. Gay, supra,* had said a number of years before that:

> The unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded.

The extent of the plenary power of Congress was discussed in an elaborate opinion of the Attorney-General as late as August 19, 1907, and the conclusion reached that "Congress has plenary authority to control the affairs and admin-

ister the property of the Five Civilized Tribes in the Indian Territory and other Indian tribes," and in an opinion dated the following day he held that section 19 of the act of April 26, 1906, *supra,* extending the period of restrictions upon the alienation, leasing or incumbrance of Cherokee full-blood lands to twenty-five years, superseded the provisions of the act of July 1, 1902, *supra,* imposing the original five-year restriction as to surplus lands, and the twenty-one year restriction as to homesteads (Op. Att'y Gen., vol. XXVI, pp. 340-355).

In the case of *Smith vs. Stevens* (10 Wall., 321), the Supreme Court sustained, as a valid exercise of legislative authority, a provision in an act of Congress requiring the approval of the Secretary of the Interior before a conveyance could be made of a certain tract of land. The court there said:

> It was considered by Congress to be necessary, in case the reservees should be desirous of relinquishing the occupation of their lands, that some method of disposing of them should be adopted which would be a safeguard against their own improvidence; and the power of Congress to impose a restriction on the right of alienation, in order to accomplish this object, can not be questioned. Without this power, it is easy to see, there would be no way of preventing the Indians from being wronged in contracts for the sale of their lands, and the history of our country affords abundant proof that it is at all times difficult, by the most careful legislation, to protect their interests against the superior capacity and adroitness of their more civilized neighbors. It was manifestly the purpose of Congress, in conferring the authority to sell on the Secretary of the Interior, to save the lands of the reservees from the cupidity of the white race; and, if the provisions of the treaty were not enough for the purpose, the speedy action of Con-

> gress was demanded by the rapid settlement of the adjacent country.

And later on in the same opinion:

> It needs no argument or authority to show that the statute, having provided the way in which these half-breed lands could be sold, by necessary implication, prohibited their sale in any other way. The sale in question not only contravened the policy and spirit of the statute, but violated its positive provisions.

It necessarily follows, from all the decisions referred to, that if Congress could have authorized the Secretary of the Interior to approve the sale of inherited lands, or any other lands, whether inherited or not, it could of course have authorized him to supervise the leasing of such lands, and the decision from which we have just quoted plainly intimates that if the provisions of the treaty under which the lands were allotted had been insufficient for the purpose Congress by a subsequent act could have provided for the further protection of the Indians against their own improvidence.

In the case of Goodrum *et al. vs. Buffalo* (162 Fed. R., 817), on appeal from the Indian Territory, decided in the Eighth United States Circuit Court of Appeals on July 23, 1908, the court said:

> It was argued there, as here, that the limitation was purely personal and did not run with the land; that the granting clause standing alone conveyed a fee simple estate, which was strengthened by the habendum clause, "to have and to hold the said tract of land unto the said John Puyallup, and to his heirs forever." It was further contended, as here, that the restriction in the patent was void because it was repugnant to the grant of an absolute fee. The court said:

> "The Indians are wards of the Government; that these arrangements and provisions are in their interest and by their consent, as indicated in the solemn treaties executed; that the Government from the necessities of the case, in consideration of the inexperience of the Indians, was compelled to insert these provisions in deeds issued to them to prevent them from becoming the prey of sharpers and speculators, who would for an insufficient consideration obtain their lands; the ultimate result being that the Indians would become pensioners of the Government and the mutual interests of the Indians and the Government demanded some such regulation.

In the case of *Harris vs. Hardridge et al.* (166 Fed. R., 109), decided in the Circuit Court of Appeals for the Eighth Circuit on December 2, 1908, the court held that Congress had the power to extend the restriction against alienation upon the allotment of a Creek freedman after the issuance of a patent.

The Appellants Have No Authority to Represent the Cherokee Full-Bloods.

The Court of Claims in its findings of fact has said that neither William Brown nor Levi B. Gritts had any authority from the full-bloods or anybody else to institute this suit; that the only right to file their petition is contained in the jurisdictional act (Finding 12, Rec., p. 27). Nor have the appellants such an interest in this suit as entitles them to have the validity of the act of April 26, 1906, *supra*, tested by this court, for, as found by the Court of Claims, Gritts has had the restrictions removed from all of his surplus lands, and William Brown, a Delaware Indian enrolled as a Cherokee, has had the restrictions removed from a part of his surplus lands (Rec., p. 27).

The restrictions upon the homesteads of both of the appellants were imposed for life, not to exceed twenty-one years. In other words, the mere fact that Congress has named the petitioners in the jurisdictional act must not be taken as conclusive of their status, for if they are found to have no such interest in the matter, as would entitle them, or have not been authorized by the proper parties, to have the questions adjudicated, the court would have no jurisdiction to declare the act invalid even though it should violate provisions of the Constitution of the United States.

We have already shown that when the provisions of the act of April 26, 1906, *supra*, known as the "McCumber Amendment," were referred to the court for construction, the question of the interest of the claimants was not conceded by any means, and it was evidently the intention of Congress to turn over the whole matter to the Court of Claims to determine, among other things, the representative capacity of the petitioners to sue, as well as their interest in the controversy. The appellants, it will be remembered, were not authorized to sue for anybody but themselves, and even their own interests must be identical with those of the full-bloods whom, without authority, they pretend to represent, but, as already stated, a substantial part of *their restrictions* had been removed. And in this connection it is important to note that before the trial of this case by the Court of Claims jurisdiction had been conferred upon the Secretary of the Interior by the act of May 27, 1908, *supra*, to remove, in his discretion, the restrictions upon all of the lands of any of the members of the Five Civilized Tribes, and the appellants, if competent to manage their own affairs, could have had their restrictions removed without coming into court.

This court, in the case of *Stewart vs. The United States and the Osage Indians* (206 U. S., 185), said:

> The passage of the act did not imply an admission that there was anything due the claimant. It simply

provided for the presentation of his claim to the court and for a decision on the merits, *without assuming to say that he had any claim of a meritorious nature.*

This is a most remarkable case. Suits were filed in the Supreme Court of the District of Columbia for appellants to test the constitutionality of the act of April 26, 1906, and evidently realizing that that court had no jurisdiction Congress was memoralized on their behalf, which resulted in the jurisdictional act being passed referring the question to the court. The full-blood Indians knew nothing of these representations. They are in favor of the restrictive legislation, it is for their protection and they assent to it. Without their knowledge this suit was instituted, and against their will it is maintained. And in their own names! Its effect will be to bring about their own undoing. To add to their injury, appellants have had incorporated in the jurisdictional act a provision authorizing them to employ attorneys for their own financial destruction, and if successful they are to be paid from the funds of these full-blood Indians. This provision doubtless accounts in part for the insistence of appellants in instituting this suit and protesting so vigorously against the intervention of the Cherokee Nation, as we have already shown that appellants are only nominal parties and otherwise can have no personal interest in maintaining this suit unless interested with those who have purchased restricted allotments and now desire to have their purchases ratified by this court. We refer to the 16th finding of the Court of Claims, where it was found that "suits have been brought by the United States embracing 25,338 transactions in the United States courts in the State of Oklahoma to cancel said deeds, contracts, and mortgages, upon the ground that they are a cloud upon the titles of such Indians to their allotments" (Rec., p. 28).

Conclusion.

While it is true that the only part of the Cherokee Nation pecuniarily interested in the result of this case are the full-bloods, it is equally true that the Cherokee Nation is vitally interested in seeing that justice is done to a large class of its citizens, and that they shall not become paupers and a charge upon the Cherokee Nation, the State, or the Government of the United States; and to that end, with the permission of the court below, it has filed a petition of intervention in their behalf and participated in the argument of the case in the Court of Claims.

As matters now stand the full-blood Cherokees desire the restrictions to remain upon their lands, and in this they are backed up by the Cherokee government. Whenever the restrictions have been removed from the allotments of individual full-bloods, it has resulted in the loss of their lands, and, owing to the wholesale violations of the prohibition upon alienation by designing persons, whenever their restrictions shall have been entirely removed, practically all that now remains to them will be lost. Now, shall this be done against the will of the interested parties upon the suit of two nominal plaintiffs who have practically no interest in the subject-matter, and whose motives are certainly not the advancement of the welfare of the Indians?

Should it become necessary in carrying out the duty of protection, undertaken at the inception of this Government, we believe the courts should rise above the mere technicalities of the law and decide upon the higher plane of right and justice. This view appears to have been taken by the Chief Justice of the Court of Claims in delivering the opinion of the court, where he says in conclusion (Rec., p. 40):

> It is a just and wise exercise of power, and rises above technicalities. The protection of property against alienation and incumbrance by those incompetent to appreciate the responsibilities of ownership, and, therefore, unable to resist designing men, is es-

sential to the welfare of society, and, therefore, not subversive of the Constitution, but is in furtherance of its purpose to establish justice, insure domestic tranquillity, and to promote the general welfare. Therefore we may concede that if the claimants were separated from their tribe and were *sui juris* and competent to manage their own affairs the acts extending the restrictions upon the lands of the full-blood Indians might well be held a discrimination among the members of the tribe and an interference with the property rights of citizens of the United States, and, therefore, obnoxious to the Constitution in the sense that the right of alienation, incumbrance, and leasing of their lands was interrupted and delayed; nevertheless, as the restrictions were imposed for their manifest benefit, *i. e.*, that they might have the continued possession, ownership, and consequent enjoyment of their lands until such time as the Government was satisfied they were competent to repel designing men and manage their own affairs, we must hold the several acts valid and effective to accomplish the purpose for which they were enacted.

The court's attention is invited to another important fact. The restricted lands are exempt from taxation while the alienable lands are taxable and subject to civil burdens (Rec., p. 32). This provision alone is of incalculable value to these Indians whose property neither personal nor real was ever before taxable. To tax it means its confiscation as every one familiar with Indian history knows.

Finally substantial justice would seem to require that the validity of sections 19, 20, and 22 of the act of April 26, 1906, should be sustained by the court upon the broad ground of the plenary power of Congress over the lands and other property of tribal Indians.

WILLIAM W. HASTINGS,
National Attorney for the Cherokee Nation.

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 331.

WILLIAM BROWN AND LEVI B. GRITZ, APPELLANTS,

vs.

THE UNITED STATES.

SUGGESTIONS AMICUS CURIÆ MADE UPON REQUEST OF CERTAIN FULL-BLOOD CHOCTAW AND CHICKASAW ALLOTTEES.

S. T. BLEDSOE.
EVANS BROWNE.

In the Supreme Court

of the

United States

WILLIAM BROWN
AND
LEVI B. GRITZ,
Appellants,

vs.

THE UNITED STATES.

No

SUGGESTIONS AMICUS CURIAE MADE UPON REQUEST OF CERTAIN FULL BLOOD CHOCTAW AND CHICKASAW ALLOTTEES.

STATEMENT.

On the 26th day of April, 1906, the President approved an Act entitled, "An act to provide for the final disposition of the affairs of the five civilized tribes in the Indian Territory, and for other purposes." (34 Stat. 137.) Sections 19 and 22 of said Act are as follows:

Section 19:

"That no full blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restrictions shall, prior to the expiration of said period, be removed by act of Congress, and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: and Provided, further: That such full blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided, further, that conveyances heretofore made by members of any of the five civilized tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove pro-

vided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions be and the same is hereby declared void: Provided further, that all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation, as long as the title remains in the original allottee."

Section 22:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

Serious doubt having been expressed at the time of the passage of the Act of April 26, 1906, as to the constitutionality of section nineteen,

and its constitutionality thereafter being challenged, Congress by a provision inserted in the Indian Appropriation Bill approved March 1, 1907, (34 Stat. 1028) authorized William Brown and Levi B. Gritz, for themselves and other Cherokee citizens having like interests to institute suit in the Court of Claims to determine the validity of any acts of Congress passed since July 1st, 1902, in so far as such acts might be deemed to increase or extend restrictions upon alienation, encumbrance or right to lease allotments of Cherokee citizens, etc.

The legislation, the constitutionality of which is involved in this proceeding, is applicable not alone to Cherokee allottees, but to the allottees of all of the Five Civilized Tribes. Counsel presenting this brief does so on behalf of a number of full-blood allottees of the Choctaw and Chickasaw Nations who occupy positions therein similar to that occupied by William Brown and Levi B. Gritz in the Cherokee Nation. These full-blood Choctaw and Chickasaw allottees insist that the Act is unconstitutional and violative of their right to control and dispose of their property.

We have not had an opportunity to examine the briefs filed either on behalf of the appellants or on behalf of the United States. We regard the position of the full-blood Choctaw and Chickasaw allottees as substantially identical, so far as the application and the validity of the statutes in question are involved, to the Cherokee full-blood allottees.

We deem it necessary to a proper understanding o four contentions that we present a short summary of the treaties and agreements entered into between the United States and the Choctaw and Chickasaw Nations, relating to the acquiring of title to the lands involved and their allotment in severalty among the members of said tribes.

In 1830 the Choctaws, who then resided east of the Mississippi River, entered into a treaty with the United States whereby the United States agreed that they would "cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River in fee simple to them and their descendants to inure to them while they shall exist as a Nation and live upon it." (7th Stat. 333).

In 1837 the Chickasaws by agreement with the Choctaws approved by the United States, were assigned a district in the Choctaw Nation, with rights equal to those of the Choctaws. (11th Stat. 57.)

In 1855 another treaty was entered into between the United States and the Choctaws and Chickasaws in which it was agreed:

> "* * * pursuant to the Act of Congress of May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw Tribes, their heirs and successors, to be held in common; so that each and every member of either Tribe shall have an equal, undivid-

ed interest in the whole; Provided, however, that no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same." (11th Statutes at large 611.)

In 1866 another treaty was entered into between the United States and the Choctaws and Chickasaw Tribes reviving and confirming the grants made in the treaties of 1830 and 1855. (14th. Stat. 769.)

The treaty of 1866 recites that it is believed "that the holding of said lands in severalty will promote the general civilization of said Nations and tend to advance their permanent welfare and the best interests of their individual members, * * * " (Art. IX. Treaty 1866). This treaty provided an elaborate scheme for the allotment in severalty of the tribal lands among the Indians. Section 33 provided that the lands selected in allotment should thereafter be held in severalty and the unselected land should be the common property of the Choctaw and Chickasaw Nations in their corporate capacities, subject to the joint control of their legislative authorities. The scheme of allotment as provided for in this treaty was not accomplished. The Choctaws and Chickasaws, as well as others of the Five Civilized Tribes, remained in possession of the tribal property and maintained tribal governments, modeled after the state governments. These governments had their legislative, execu-

tive and judicial departments. Laws were enacted, revenue collected, and schools maintained.

This condition of affairs continued to exist without further effort to allot the lands of said tribes until March 3, 1893. On that date the President approved an Act providing for the appointment of Commissioners to enter the negotiations with the Cherokee, Choctaw, Chickasaw, Muskogee (Creek) and Seminole Nations for the purpose of the "extinguishment of the national or tribal title to any lands within that territory, now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by allotment or division of the same in severalty among the Indians of said tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations or tribes aforesaid or each of them with the United States, with a view to such an adjustment on the basis of equity and justice as may be with the consent of such nations or tribes or Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a state or states of the Union, which shall embrace the lands within said Indian Territory."

Section 15 of said Act also contained the following provision:

> "The consent of the United States is hereby given to the allotment of lands in severalty, not exceeding one hundred sixty acres to any one individual within the limits

> of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, or Seminoles, and upon such allotment the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. * * * and upon the allotment of such lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

This legislation was enacted after a special investigation instituted and conducted by committees of Congress. The Commission thus created was duly appointed, organized, visited the Indian Territory and entered into negotiations with the various tribes and from time to time reported the progress of its work to the Secretary of the Interior and to the President of the United States. The authority of the Commission was enlarged from time to time and particularly by the acts of June 10, 1896 (29 Stat. 339), and of June 7, 1897 (30 Stat. 83).

On April 27th, 1897, these Commissioners on behalf of the United States entered into an allotment agreement with the Commissioners acting for and on behalf of the Choctaw and Chickasaw Tribes of Indians, which agreement received the approval of Congress as Section 29 of the Act of June 28, 1898 (30 Stat. 495). This agreement is known as the "Atoka Agreement" and was ratified by the Choctaws and Chickasaws. However, no allotments were made under its provisions. Prior to the beginning of allotment thereunder another and subsequent agreement was entered into and ratified by both the

United States and the Choctaws and Chickasaws. This agreement is known as "The Choctaw-Chickasaw Supplemental Agreement." The Act of Congress containing and confirming this agreement was approved July 1st, 1902 (32 Stat. 641), and ratified by the Choctaws and Chickasaws, September 25, 1902. The provisions of said agreement providing for the allotment of the lands of the Choctaw and Chickasaw Tribes among the members thereof, imposing restrictions upon alienation are found in Sections eleven to sixteen, inclusive, and section twenty-two, which sections are as follows:

Section 11:

"There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations, to conform, as nearly as may be, to the areas and boundaries established by the government survey, which land may be selected by each allottee so as to include his improvements. For the purpose of making allotments and designating homesteads hereunder, the forty-acre or quarter-quarter subdivisions established by the government survey may be dealt with as if further subdivid-

ed into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

Section 12:

"Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead."

Section 13:

"The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

Section 14:

"When allotments as herein provided have been made to all citizens and freedman, the residue of lands not hereing reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United

States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes."

Section 15:

"Lands allotted to members and freedman shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold as herein provided."

Section 16:

"All lands allotted to members of said tribes, except such lands as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: one-fourth in acreage in one year; one-fourth in acreage in three years; and the balance in five years; in each case from date of patent: Provided, that such lands shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.

Section 22:

"If any person whose name appears upon the rolls, prepared as herein provided, shall have died intestate subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled, if living, shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs

according to the laws of descent and distribution as provided in chapter forty-nine of of Mansfield's Digest of the Statutes of Arkansas: Provided, that the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted."

Patents were issued and recorded pursuant to sections 65 and 66 of this agreement. It will be observed under the provisions of this agreement, the homestead of the allottee was inalienable during his lifetime, not to exceed twenty-one years. The homestead of the freedman was likewise inalienable during the lifetime of the allottee, not to exceed twnty-one years. Lands other than the homestead of the allottee were alienable after issuannce of patent, one-fourth in acreage in one year, one-fourth in three years, and the balance in five years. No restrictions upon alienation were imposed upon the land selected under section 22 in the name of the allottee, after his death, but such land descended to the heirs of the allottee under the laws of descent and distribution of Mansfield's Digest of the Statutes of Arkansas.

In the meantime and on March 3, 1901, the President approved an Act of Congress declaring every Indian in the Indian Territory to be a citizen of the United States with all the rights, privileges and immunities of such. (31 Stat. 1447.)

Section 19 of the Act of April 26, 1906, Extending Restrictions Upon the Right of Alienation by Full-blood Allottees of the Five Civilized Tribes of Their Allotments for a Period of 25 Years Is violative of the Fifth Amendment to the Federal Constitution and Void.

Before proceeding with the discussion of the questions involved, we desire to call the court's attention, briefly, to the distinction between the Five Civilized Tribes and Reservation Indians, both from the standpoint of congressional legislation and civilization and enlghtenment. The Choctaws, Chickasaws, Cherokees and Creeks, from the time of their removal west of the Mississippi, and until changed by legislation in recent years, curtailing their powers, maintained governments patterned after those of the states. Each nation has had its constitution, its chief executive, its legislative bodies and judiciary. Each has levied and collected its own taxes, conducted its public schools and otherwise exercised all the functions of an independent government.

The members of these tribes are enlightened, progressive, and, in the main as capable of caring for their individual interest as is the average citizen of the United States. They are not roving, ignorant, uncouth and savage, incapable and irresponsible, though such is some times charged to be the fact. This court, as has the Circuit Court of Appeals for the Eighth Circuit, has given to the judgment of the courts of these

tribes the same faith and credit as is given to the judgments of the courts of the states. Prior to the enactment of the laws hereinbefore referred to, providing for the allotment in severalty of the lands of these tribes and conferring upon the members thereof citizenship in the United States Congress has sent its committees into the Indian Territory and had made a careful and thorough investigation and arrived at the conclusion, no doubt, that the members of these tribes were as competent to take care of themselves as are other citizens of the United States. Because of the fact that these tribes held title to the land in fee simple and were really what Congress styled them in its legislation, "The Five Civilized Tribes," Congress deemed a disposition of their affairs of such importance that it created a special commission and delegated to that commission the authority to negotiate and enter into agreements with these tribes for the allotment in severalty of the tribal lands.

This commission was created by Act of Congress, approved March 1st, 1893 (27 Stat. 645), which gave the consent of the United States to the allotment in severalty of the lands of the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, and gave to the commission to use as an argument in favor of allotment, the declaration that "upon such allotments the individual to whom the same may be allotted shall be deemed to be, in all respects, citizens of the United States." The word **all** was evidently inserted for

some purpose. The declaration was not that the allottee shall be deemed in some respects a citizen of the United States or shall have in some respects the rights of a citizen of the United States, but that he shall be deemed to be in all respects a citizen of the United States.

It will be observed, therefore, that by the very statute creating the commission and authorizing the allotment in severalty, it was provided that every Indian received an allotment should be deemed in all respects a citizen of the United States and that upon allotment the reversionary interests of the United States in and to the lands so allotted should be relinquished and should cease.

On the 3d day of March, 1901, the President approved an act to amend Section 6 of Chapter 119 of the United States Statutes at Large, numbered 24, page 390, as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that eSction 6, Chapter 119, United Statutes at Large, numbered 24, page 390, is hereby amended as follows, to-wit: After the words 'civilized life,' in line 13 of said Section 6, insert the words 'and every Indian in the Indian Territory.'" (31 Stat. 1447.)

The section, as amended, reads in part as follows:

> "That every Indian in the Indian Territory is hereby declared to be a citizen of the United States and is entitled to all the

rights, privileges and immunities of such citizens, whether such Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affectng the right of any such Indian to tribal or other property."

The report of the Committee on Indian Affairs, of the Senate, in support of this bill, being report No. 2483, made to the 56th Congress, second session, on the 28th day of February, 1901, and ordered to be printed, is reproduced as Appendix A at the conclusion of this brief.

This report contained some of the reasons why the committee advised the enactment of the law. The purpose, according to the report of the committee, was that every Indian in the Indian Territory should "at once be put upon a lawful and equal footing with the great population with whom they are now intermingled."

Citizenship had been promised in 1893 to each and every member of the Five Civilized Tribes who would accept an allotment in severalty. The promise was, as to Choctaws and Chickasaws carried out before allotment actually began. In other words, they were made citizens of the United States with all the rights, privileges and immunities of such in 1901, although the allotment of the lands of the Choctaws and Chickasaws was not begun until 1902.

The Choctaw - Chickasaw Supplemental Agreement was adopted after the approval of the Act of March 3rd, 1901, conferring national citizenship upon every Indian in the Indian Territory.

Under the provisions of the Supplemental Agreement no distinction whatsoever was made on account of the quantum of Indian blood possessed by the allottee. The extent of restrictions upon alienation was in no way dependent thereon. Under the Choctaw-Chickasaw Supplemental Agreement above quoted, the surplus allotment of all members of the tribe was made alienable after issuance of patent as follows:

One-fourth in acreage in one year, one-fourth in acreage in three years and the balance in five years.

Four years having elapsed since the beginning of allotment before the approval of the Act of April 26, 1906, there were many of the full-bloods whose surplus allotment had, in part at least, become alienable under the provisions of said agreement.

The provisions of Section 19, April 26, 1906, not only undertake to prohibit the alienation for a period of twenty-five years of those lands which were then subject to a short period of restriction upon alienation, but sought to prohibit the alienation for a period of twenty-five years of that part of the surplus allotment of full-blood

Choctaws and Chickasaws which had become alienable under the provisions of the Choctaw-Chickasaw Supplemental Agreement.

It is respectfully insisted that it was not within the power of Congress to so impose restrictions upon alienation of the lands which were at the time free from restrictions upon alienation or to extend for a period of twenty-five years restrictions upon alienation which would terminate in any event in five years.

We believe that when the members of the Five Civilized Tribes were made citizens of the United States, in 1901, that the guardianship of the United States theretofore existing ceased.

That upon the selection of an allotment and its segregation from tribal property and conversion into individual property, the control of the federal government over the lands so selected in allotment, wholly ceased. In other words, the individual allotment ceased to be tribal property and became individual property, and the reversionary interest of the United States and passed to the allottee. The individual allottee had ceased to be a ward of the government and had become a citizen thereof.

By what stretch of authority could the federal government prohibit such individual citizen from alienating his individual property for a period of twenty-five years? May justification be found for this act in the fact that the allottee is of Indian blood? Is an allottee any less a citi-

zen of the United States because he is of Indian descent? Are his rights, privileges and immunities as a citizen of the United States rendered less sacred because of his Indian parentage? If so, what quantum of Indian blood is necessary to destroy the rights of citizenship? Will the fact that the allottee is 1-64, 1-32, 1-16 or 1-4 or 1-2 Indian blood be sufficient? Or is it the full-blood only whose rights may be thus impaired? We believe that this interrogatory may be best answered by quotation from the opinion of this court in the matter of Heff, 197 U. S. 488, in the following language:

> "Can it be that because one has Indian and only Indian blood in his veins he is to be forever one of a special class over whom the general government may, in its discretion, assume the rights of guardianship which it once abandoned, and this whether the state or the individual himself consents We think the reach to which this argument goes demonstrates that it is unsound.

The Five Civilized Tribes were not located within a state at the time of the approval of the act of April 26th, 1906. It was, therefore, not necessary to secure the consent of the state, but it was none the less necessary to secure the consent of the individual whose right to contract was impaired and whose property was taken thereby without due process of law.

This court also **(in re Heff, Supra.)** made reference to the Act of March 3rd, 1893 (27 Stat 645), supra, in the following language:

"We make these references to recent treaties, not with a view to determining the rights created thereby, but simply illustrative of the proposition that the policy of the government has changed and an effort is being made to relieve some of the Indians from their tutelage **and endow them with the full rights of citizenship, thus terminating between them and the United States the relation of guardian and ward.**"

(The black type is ours.)

We respectfully submit that the interpretation thus given, of the scope and purpose of the Act of March 3, 1893, which has its consummation in the Act of March 1st, 1901, before completion of allotment as to some of the allottees of the Five Civilized Tribes, is undoubtedly the correct interpretation of the same and is applicable to the case at bar. Without quoting at length therefrom this court's attention is called to the splendid exposition of the law upon this subject found in the following cases:

Ex Parte Viles, 139 Fed 70.

United State vs. Hall, 171 Fed., 214.

United States vs. Dooly, et al., 151 Fed. 697.

United States vs. Saunders, 96 Fed., 268.

United States vs. Kopp, 110 Fed., 160.

United States vs. Auger, 153 Fed., 671.

Ex Parte Savage, 158 Fed., 205.

United States vs. Boss, 160 Fed., 132.

To summarize: The Choctaw and Chickasaw Nations held the title to their tribal domain by a qualified fee, the possibility of reversion only being vested in the United States.

Cherokee Nation vs. Railroad Co., 33 Fed., 900.

The Cherokee Trust Funds, 117 U. S., 288.

Cherokee Nation vs. Southern Kans. Ry. Co., 135 U. S., 656.

The tribal lands so held have been allotted in severalty pursuant to the Supplemental Agreement, allotment certificates and patents issued therefor and the allottees have been made citizens of the United States.

Some of the lands so allotted are subject to restrictions upon alienation. Such restrictions were imposed for the protection of the allottees and vested no interest whatever in the United States, in reversion or otherwise. Such restrictions upon alienation do not debase the title received by the allottees below that of a fee simple estate.

Libby vs. Clark, 118 U. S., 255.

Scrimscher vs. Stockton, 183 U. S., 290, 299.

The conditions existing when the Act of April 26th, 1906, became effective, so far as involved in this litigation, were as follows:

The allottees were citizens of the United States with all the rights, privileges and immunities of such. The lands involved had been segregated from the tribal domain, allotted and patented to the allottee, subject to certain restrictions upon alienation imposed by agreement between the tribal authorities and the United States.

The legislation in controversy was enacted without the consent of the individual or the tribe. We say without the consent of the tribe, not because we deem it important, or that the tribe could have consented for the individual citizen of the United States as to his individual property, but because it has sometimes been contended that tribal consent might suffice in lieu of individual consent. The decisions of this and of other courts determining when the rights of citizenship attached and the wardship ceases are, as we contend, in point.

In so far as these cases determine whether the right to prosecute for the sale of intoxicating liquors to an Indian exists, they are not necessarily in point. There is no constitutional guaranty that any citizen of the United States may buy, sell, barter, or drink intoxicating liquors.

There is a constitutional guaranty that no person shall be deprived of his property without due process of law. A decision, therefore, holding that jurisdiction exists under the Act of 1897 to prosecute for the sale of intoxicating liquors to a citizen of the United States of In-

dian descent does not in the least militate against the contention that Section 19, of Act of April 26th, 1906, constitutes a taking of the property of full-blood allottees without due process of law.

The mere ownership of an interest by a full-blood allottee of the Five Civilized Tribes in the undivided tribal property certainly does not render his individual property subject to be dealt with at the will of Congress without regard to constitutional restraint. Neither would his membership in the tribe divest his individual property of constitutional protection. Membership in the tribe and the authority of the federal government over the tribal property is wholly separate and distinct from citizenship in the United States and control of individual property.

It is contended that the conferring of citizenship did not impair the right of the federal government to deal with tribal property. It might be asserted with much more reason that membership in the tribe and interest in undivided tribal property or even the continuance of tribal government in no wise impair the rights, privileges and immunities of citizenship as applied to the individual property, nor lessens the authority and control of the allottee over his individual property nor increases the power of Congress in dealing therewith.

The management, control and disposition of the individual property of the full-blood allottee

is in no wise affected by his membership in the tribe nor his interest in the undivided trbal property.

Suppose that in the interim after the selection of an allotment and before the approval of the Act of April 26, 1906, a full-blood allottee of the Choctaw or Chickasaw tribes had exchanged one-fourth or one-half of his surplus allotment, which had become alienable under the provisions of the Choctaw-Chickasaw Supplemental Agreement for a like amount of land with another allottee whose lands were alienable, or with some one residing in Texas, Kansas or some other state. Could Congress have said that the lands thus acquired in exchange should not be alienated for the period of twenty-five years? Would it not have had just as much constitutional authority to do so as to say that allotted lands should not be alienated for twenty-five years? Would not Congress have just as much right to prohibit the alienation of land acquired by purchase, inheritance or devise as it would to prohibit the alienation of that received in allotment?

Some of the Cherokees did not have a full allotment of land and are permitted to take money in lieu thereof. Suppose one of these Cherokee allottees should select a homestead upon the public lands of the United States and receive a patent therefor. Could Congress, after his title was perfected, by the issuance and recording of patent in the land office, enact that

the lands so selected should become and remain inalienable for a period of twenty-five years?

We most respectfully contend that any legislation of the character above indicated would fall within the condemnation of the fifth amendment to the constitution.

It is unnecessary to enter into discussion of whether or not the right to lease, encumber or dispose of allotted lands is property.

That such rights come within the elementary definition of property, we believe, is beyond controversy.

That the prohibition against alienation for the period of twenty-five years is a taking of property within the meaning of all of the adjudged cases upon this subject we regard as also too well settled to need the support of a citation of authorities.

That the taking is without due process of law is clearly established by the fact that it is done by legislative action, without the consent of the allottees and without compensation.

The only theory upon which this legislation can be sustained is that Congress has the right to take the property of the full-blood allottee without due process of law and without compensation because such allottee is of "Indian" and "only Indian blood."

Cases Cited in Support of the Constitutionality of the Act by the Court of Claims Are Not Applicable.

The first case cited by the Court of Claims in support of its contention is that of **Lone Wolfe vs. Hitchcock,** 187 U. S., 553-567, which

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was a suit to restrain the allotment of lands to members of the Kiowa and Comanche Tribes of Indians on the ground that the Secretary was proceeding under an Act of Congress in violation of a previous treaty made with the Tribes, providing that their lands should not be allotted until a majority of all of the members of the Tribes had voted therefor. It was further insisted that a majority of the Tribes had not so voted and that the United States had amended the treaty after its ratification by the Indians without their knowledge or consent.

The Kiowas and Comanches were not located in the Indian Territory, were not citizens of the United States, and the property was tribal property. The relief sought by the Indians was denied. The authority of the United States to so deal with the matter in controversy was by the opinion of the Court especially limited to tribal lands, in the following paragraph of the opinion (567):

> "The Indians who had not been fully emancipated from the control and protection of the United States are subject, at least, so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in **Choctaw Nation vs. United States,** 119 U. S., 1, 27, and **Stephens vs. Cherokee Nation,** 174 U. S., 445, 483."

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Therefore, in the case of **Lone Wolf vs. Hitchcock,** neither **citizens** of the United States nor their individual property was being dealt with.

The next case cited is that of **Cherokee Nation vs. Hitchcock,** 187 U. S., 294, which involved the authority of the Secretary of the Interior to lease **tribal lands** of the Cherokee Nation pursuant to and in accordance with an Act of Congress. The authority of the Secretary to make such lease was sustained upon the ground that the land of the Cherokee Nation was **tribal property,** held by the Nation in its tribal capacity, and that Congress is vested with authority to take measures to make the tribal property productive and to secure therefrom an income for the benefit of the tribes. In this instance Congress was simply dealing with tribal relations and tribal property, and not with an individual citizen of the United States and his individual property.

Another case cited by the Court of Claims in support of its contention is that of **United States vs. Rickert,** 188 U. S., 432, being a suit instituted in the name of the United States to restrain the collection of state taxes upon the improvements located upon lands allotted under the general allotment act of 1887, and on certain persona lproperty furnished by the United States and used for the cultivation of such lands by the allottees. The case turned principally upon the rights acquired by the allottee under the general allotment act

and the obligations assumed by the United States. A quotation from the opinion, found in the decision of the Court of Claims, is as follows:

> "The granting of citizenship does not affect the acquiring of title to land allotted to the Indians nor is a restriction against alienation inconsistent with citizenship."

This court in the Rickert case was speaking about restrictions upon alienation imposed in the Act under which the allotments were made, and not restrictions after citizenship had been granted and an unconditional grant in fee acquired.

Another case cited by the Court of Claims in support of its conclusions is that of **United States vs. Thurston County, Nebraska,** 143 Federal, 287. This was a suit instituted by the United States to enjoin Thurston County, Nebraska, from collecting taxes on certain moneys deposited in a bank by the order of the Secretary of the Interior. These moneys were proceeds of the sales of inherited lands as to which the United States had obligated itself to hold "for a period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his death, of his heirs." The heirs had been permitted to sell on condition that the proceeds of the sale should be deposited to their respective individual credits in a bank selected by the Commissioner of Indian Affairs, subject to their respective checks, not to exceed ten dollars in any one

month. In no instance, had the twenty-five years, during which the United States had undertaken to hold the allotments expired. It was held that these trust funds stood in the same relation as the lands for which they were sold, and were not subject to taxation by the state. We quote as follows from the opinion:

> "Allotted lands were held by the United States for the benefit of those to whom they were assigned and their heirs under the acts of August 7, 1882, and February 18, 1887. The proceeds of the sales of these lands have been lawfully substituted for the lands themselves by the trustee. The substitutes partook of the nature of the originals and stood charged with the same trust."

It is not believed that this decision, even remotely, sustains the opinion of the Court of Claims.

Another case cited by the Court of Claims in support of its decision is that of **Dick vs. United States**, 208 U. S., 340 and 353, to the point that "the authority of the state can not be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes."

That case involved a prosecution for violation of the Act of 1892, prohibiting the sale of intoxicating liquors to Indians. In reference thereto the Court said:

> "If this case depended alone upon the federal liquor statute forbidding the introduction of intoxicating liquors into the Indian

country, we would feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words, 'Indian country,' to embrace any body of territory in which at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the state, for all purposes of government, was full and complete. **Bates vs. Clark,** 95 U. S., 204; **Ex Parte Crow Dog,** 109 U. S., 556, 561.

"But this case does not depend upon the construction of the federal liquor statute, considered alone. That statute must be interpreted in connection with the agreement of 1893 between the United States and the Nez Perce Indians. By that agreement, as we have seen, the United States stipulated that the lands ceded by the Nez Perce Indians, and those retained as well as those allotted to the Indians (which embraced all the lands in the original Reservation), should be subject, for the limited period of twenty-five years, to all federal laws prohibiting the introduction of intoxicants into the Indian Country."

This case, therefore, involved the question of jurisdiction to punish for a crime under the peculiar provisions of the agreement between the United States and the Nez Perce Indians, entered into long before the admission of the state. It involved no question of the taking of property without due process of law.

It is believed that all of the cases that will be cited in support of the constitutionality of

this legislation will be of litigation founded upon trust patents relating to the control of tribal property and on the question of jurisdiction to prosecute for the sale of intoxicating liquors to Indians.

The case of **United States vs. Celestine,** 215 U. S., 278, is sometimes used to support conclusions of the character of those found in the judgment of the Court of Claims. The distinction suggested in the Celestine case with reference to the fact that in that particular case the Indian had not, by the terms of the allotment act, been remitted to the jurisdiction of the state, would be immaterial in the case at bar. While it might be material upon a question of jurisdiction of the Courts of the United States, it would not be material upon the question of the protection of the fifth amendment to the constitution. In other words, a citizen of the United States has the protection of the fifth amendment without regard to his state citizenship. In the case of **United States vs. Celestine, supra,** this Court also noted the purpose of Congress as expressed in the Act of May 8, 1906, (34 Stat. 102), extending the trust period of allottees under the Act of 1887. The Indians in the Indian Territory were specifically exempted from the provisions of said Act, under the conditions and for the reasons set forth in Appendix B hereof.

Reservations in the Enabling Act.

The Enabling Act providing for the admission of the State of Oklahoma into the Union having been approved June 16, 1906, is referred to in the opinion of the Court of Claims as throwing some light upon the authority of Congress in enacting the Act of April 26, 1906, and the effect and purpose thereof. Said Enabling Act contained the following provision:

> "That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed." (34 Stat., 267.)

Is this not simply a reservation to deal with the Indians touching their tribal rights and tribal property? That such is the intention is indicated by the provision, "by treaties, agreement, law or otherwise. This section makes no provision for continuing in force any particular

dissolution of the marriage contract between members of these tribes is controlled by the laws of the state; the validity of the personal obligations of the members of these tribes is determined by the laws of the state; they are tried and punished for violation of the laws of the state; a substantial portion of their lands bear the burdens of taxation; all of which matters were subjects of Congressional legislation prior to statehood.

If the Enabling Act is to be interpreted as reserving to the federal government the authority to legislate with reference to the members of the Five Civilized Tribes upon all the matters above set out, then the provision is violative of the federal constitution, because it would deprive the State of Oklahoma of the power to legislate with reference to all of those matters, committed by the constitution to the states. Oklahoma, under such requirements, instead of having been admitted upon an equal footing with the other states of the Union, would be reduced in her sovereign authority below the standard of an ordinary dependency of the crown governments.

The constitution of the United States does not contemplate or tolerate a union of unequal states.

The Supreme Court of the United States in the case of **Pollard's Lessee vs. Hagan,** 3 Howard, 391 and 409, uses the following language:

"When Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. **And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain, within the limits of a state, or elsewhere, except in the cases in which it is expressly granted.** (Black type is ours.)

"The right of Alabama and every other new state, to exercise all the powers of government, which belongs to, and may be exercised by the original states of the Union, must be admitted, and remain unquestioned, except so far as they are temporarily deprived of control over the public lands."

"The declaration, therefore, contained in the compact entered into between them when Alabama was admitted into the Union, 'that all navigable waters within said state shall forever remain public highways, free to the citizens of said state and of the

this constitutional authority in Congress be construed as to invest Congress as an agent with powers to impose other conditions upon the new member which the constitution has not prescribed? And, if so, does the new state enter the Union shorn of its power protanto by the agent authorized to open its doors to the new commonwealth without any such condition? The better opinion would clearly be that Congress could not impose as an obligation upon a state at the time of its admission into the Union such a restriction as it had no original power to enact or enforce."

Mr. Cooley, in his Principles of Constitutional Law, page 195, says:

> "Other conditions have been imposed and a common requirement upon the admission of a state is that it shall waive all right to impose taxes on the land of the United States. Some of these conditions are beyond question irrevocable, by the states. Such, for example, are those last mentioned, which are irrevocable because they constitute articles of compact between the state and Union, which would render the taxation void. Such also would be a condition respecting boundary, as in the case of Michigan. But when a state comes into the Union, it is received on an equal footing with the original states and with all their rights and privileges."

The authority of the federal government is limited to those matters delegated to it by the constitution. The exercise of the ordinary po-

lice power or the discharge of the duties of municipal government within the state are not among the delegated authorities. An agreement entered into by the United States and a state by which the state undertook to delegate to the federal government functions not delegated by the constitution but reserved to the states and the people of the states respectively, would be violative of the federal constitution and of no effect. Congress, largely composed of lawyers as it is, kne wsuch to be the case when the Oklahoma Enabling Act was passed. Congress therefore will not be presumed to have intended to reserve jurisdiction and authority which could not be lawfully exercised within the state.

Ordinarily the matter discussed under this heading would not be appropriate in the consideration of the subject matter in controversy. In view of the fact, however, that the Court of Claims considered the provisions of the Enabling Act as tending to support the constitutionality of the acts involved, we have deemed it not improper to present these views upon the authority of Congress in the premises.

Section 22 of the Act of April 26, 1906, is also violative of the fifth amendment to the federal constitution if construed to extend without limitation restrictions upon alienation of inherited lands, but such is not its proper construction.

Section 22 of the Act of April 26, 1906, specifically provides that the "adult heirs of any

orate opinion interpreting this statute. The Secretary approved this opinion. This was while the matters touching the enactment of the legislation was fresh in the minds of the departmental officials.

The Department of the Interior is always jealous of its authority over the Indian tribes and Indian affairs. That authority is not relinquished except when the department is convinced beyond controversy that it cannot be lawfully asserted. The opinion of the department, therefore, in construing section 22 above quoted against its own authority is the strongest evidence of the fact that such provision would not bear any other construction. The opinion of the Assistant Attorney General as approved by the Secretary is in full as follows:

Department of the Interior.

Office of Assistant Attorney General.
Washington.

January 29, 1907.

24788-1906.

Int. Ter. Div.

The Secretary of the Interior.

Sir: You have submitted the papers relating to the approval of the deed executed under the direction of the United States Court by the curator of the estate of Willis and Richardson Watson, minor, full-blood Choctaw Indians, covering one hundred and twenty acres of land originally allotted to their father, Robinson Watson, saying:

"In view of sections 19, 20 and 22 of the Act of Congress approved April 26th, 1906, (34 Stat. 137), your opinion is requested in the matter."

The land in question being the southeast quarter of the northwest quarter, the southwest quarter of the northwest quarter, the northeast quarter of the northwest quarter of the southwest quarter, the north half of the northeast quarter of the southwest quarter and the northwest quarter of the northwest quarter of the southwest quarter, section 25, T. 5 S., R. 1 E., in the Choctaw Nation, Indian Territory, was allotted Robinson Watson, a Choctaw by blood, as a homestead, May 28th, 1903, and homestead patent executed in his favor was filed for record in the office of the Commission to the Five Civilized Tribes Sept. 18, 1905.

It is alleged in the petition for the sale of these lands that they were set apart to Willis Watson and Richardson Watson as their part of the lands belonging to the estate of their deceased father, Robinson Watson, March 31st, 1906, after due notice thereof, C. D. Wortham, as curator filed in the United States court for the Southern District of the Indian Territory, application to sell said real estate for the education and support of said minors. An order was that day made directing such sale to be made May 12th, 1906, and appraisers were appointed to view and appraise the property. They appraised it for $1,200.00 and the property was sold May 12th, for $1,100. This sale was subsequently approved by the

court and deed executed thereon May 14th, 1906. In view of the provisions of section 22 of the Act of April 26th, 1906, the department has been asked to give its approval to this sale.

In the Act of June 28th, 1898, (30 Stat. 495, Sec. 29), it was provided that each allottee of the Choctaw and Chickasaw Tribes of Indians should select from his allotment a homestead of 160 acres for which he should have a separate patent and which should be inalienable for twenty-one years from date of patent. In the Act of July 1, 1902, (32 Stat. 641), it is provided that each member of said tribes shall at the time of selecting his allotment designate as homestead land equal in value to one hundred and sixty acres of the average allottable lands of the Choctaw and Chickasaw Nation 'which shall be inalienable during the lifetime of the allottee not exceeding twenty-one years from the date of the certificate of allotment, and separate certificates and patent shall issue for said homestead.'

Certificate and patent for the land in question issued to Robinson Watson, as a homestead, and under the terms of this provision of law descended at his death to his heirs, free of any restrictions upon alienation.

The Act of April 28th, 1904, (32 Stat. 573), contains the following provision:

All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said territory, whether Indian, freedman, or

otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlement of all estates of decedents, the guardianship of minors and incompetents, whether Indian, freedman or otherwise.

These minors and their lands, held by them free from any restrictions upon alienation, were within the jurisdiction of the United States court as described in this law, and it had, at the time the petition for sale was presented, full authority to entertain the petition and to direct the sale.

You refer to sections 19, 20 and 22 of the Act approved April 26th, 1906, as presumably having significance in connection with this matter. Section 19 provides "that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restrictions shall, prior to expiration of said period, be removed by acts of Congress." This provision related to allottees and has no bearing on the question here presented. Section 20 refers exclusively to leases and rental contracts and does not effect this case. Section 22 reads as follows:

That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued, for his or her share of the land of the tribe to which

he or she belongs, or belonged, may sell and convey the lands inherited from such decedent; and if there be born, adult and minor heirs of such decedent, then, such minors may join in the sale of such lands by a guardian duly appointed by the proper United States Court of the Indian Territory. And in case of the organization of a state or territory, then by the proper court of the county in which said minor, or minors, may reside, or in which said real estate is situated, upon an order of such court made upon application filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians, are to be subject to the approval by the Secretary of the Interior, under such rules and regulations as he may prescribe.

This section provides the manner in which sales may be made, notwithstanding any restrictions upon alienation, and seems to apply to the heirs of all deceased allottees without regard to quantum of Indian blood. It cannot, however, be held to apply to heirs who received their inheritance freed of all restrictions. There would have been no occasion for this provision or field for its operation if the same provision that relates to homesteads had extended to the other or surplus allotted lands. The provision as to surplus lands of the Choctaws and Chickasaws in the Act of July 1, 1902, supra, is that they may be alienated one-fourth in acreage in one year; one-fourth in three years, and the balance in five years from the date of patent. There is no permissable construction of said section 22, except that

it applies so far as the Choctaws and Chickasaws are concerned to these surplus lands which descend to the heirs burdened with the restrictions upon alienation and not to the homestead which descend to the heirs freed of all such restrictions.

If this is the proper construction of these laws this department has no jurisdiction over the sale of lands thus held by minors freed of restrictions, and no function to perform in connection therewith. Believing that no other construction is permissible, I am of the opinion, and so advise you, that the law does not require any action on your part in this matter.

The papers are returned herewith.

Very respectfully,

FRANK L. CAMPBELL,

Assistant Attorney General.

Approved:

January 29th, 1907.

E. A. Hitchcock.

Secretary.

The statement in this opinion with reference to this Act that "it cannot, however, be held to apply to heirs who receive their inheritance free of all restrictions, is in our judgment, a brief, terse and correct interpretation of said provision.

This construction that the provisions of this act did not extend to heirs who receive their inheritance free of all restrictions was accepted and acted upon by all purchasers of inherited

lands became valuable and on July 20th, 1894, he made another lease of the same land to the defendants for 20 years, for a very materially increased consideration. After the execution of this second lease Congress passed a resolution authorizing the secretary to approve the lease to the defendants if, in his discretion, he deemed it advisable, and shortly afterward the secretary did approve the last lease. By such act the secretary, under congressional authority, sought to reassume control and dominion over the land of this Indian and subject him to the burdens of tribal property. Here was a direct attempt on the part of the government to control the individual land of a purely tribal Indian, to whom lands of his tribe had been segregated. He had dealt with the lands improvidently and the government sought to reach after and draw them back to its protection and control. The Supreme Court, in disposing of the matter, on page 32, said:

> "The title to the strip of land in controversy having been granted by the United States to the elder Chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs, and usages of the tribe, to his eldest son and successor as Chief Moose Dung, the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or of Congress, or of the Executive De-

partments. The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty or to affect titles already granted by the treaty itself."

* * * * * * The Congressional resolution of 1894 and the subsequent proceedings in the Department of the Interior must therefore be held to be of no effect upon the rights previously acquired by the plaintiffs by the lease to them from the younger chief."

This case it seems to us, directly denies the power of Congress to impose restrictions where none exists. Upon the same reasoning Congress is without power to add to restrictions already imposed. The one act would be as obnoxious to constitutional provisions as the other.

Under the scheme of allotment in the Five Tribes all the right, title and interest of the United States, the tribe and the remaining members thereof passed to the allottees. That being so, how can the government expect to revive the tribal character of these lands and resubject them to its dominion and control? The title having passed by grant it can never be repealed and there can never thereafter be revived in the United States any vestige of right, title or interest. (**Stevens vs. Smith,** 2 Kan., 238, 245.)

The only way, in the absence of interest in the **res** itself, in which the government can reach these lands, is through its control over tribal af-

fairs, and the lands having passed from that tribal control into individual ownership, every vestige of dominion over them by the government through either of these channels is lost, and when once lost can never be revived.

On June 30th, 1906, the United States Senate, by resolution, selected a committee consisting of five senators to fully investigate the matters connected with the condition of affairs in the Indian Territory, included in the act entitled " An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes, approved April 26th, 1906, and kindred matters."

The committee was directed to make full and complete report, together with their conclusions and recommendations, to the Senate of the United States.

This committee was composed of Senator Clarence D. Clark, of Wyoming, Chairman of Judiciary of the Senate, Senator Chester I. Long, of Kansas; Senator Frank B. Brandegee, of Connecticut; Senator Henry M. Teller, of Colorado, a former Secretary of the Interior, and Senator William A. Clark, of Montana.

The report of the committee affecting the constitutionality of the act in controversy is found in Vol. 1, at page 5 of a publication entitled "Report of select committee to investigate matters connected with the affairs in the Indian Territory, 1906," and is as follows:

"By the Act of March 3, 1901, all Indians in Indian Territory were made citizens of the United States. The Indian tribes had title to these lands by patents from the United States. These lands were occupied in common by the members of the respective tribes. By the Supplemental Agreements made in 1902 these Indians agreed to take their lands in severalty upon condition that they could alienate their allotments within a certain period, which differed in the several tribes. We believe that Congress might shorten this period and permit alienation at an earlier date.

"Congress, by the Act of April 21, 1904, removed the restrictions upon the alienation of all allottees of either of the Five Civilized Tribes who were not of Indian blood, except minors, and except as to homesteads, and provided that restrictions upon the alienation of all other allottees, except minors, and except as to homesteads, might, with the approval of the Secretary of the Interior, be removed upon application to the Indian agent at the Union Agency."

"Section 19 of the Act of April 26th 1906, provides that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes should have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the approval of that act, unless such restrictions, prior to the expiration of said period, shall be removed by Act of Congress.

"We believe that this last legislation was unwise, injurious to the Indian, and of no validity. Congress, after providing in the Supplemental Agreements that all the lands allotted to the citizens of the different tribes should be alienable within certain periods, could not, without the consent of the Indians, extend the time in which the lands could not be alienated and add to the restrictions imposed by the Original Agreements. The effect of this legislation has already clouded, and, if unrepealed, will continue to cloud th etitle of much land in Indian Territory, and will result in endless litigation.

"It will prevent the Indians from obtaining a fair price for their lands, and has been and will continue to be a fruitful source of dishonest transactions.

"It will not prevent sales being made at the expiration of the period designated in the Supplemental Agreements, and has already resulted in contracts being made for such sales. This provision is generally considered to be invalid and should be repealed."

In the recent case of **Midland Oil Company et al., vs. Turner et al.,** 179 Fed., 74, there was involved the authority of the Secretary of the Interior to permit and approve the assignment of an oil and gas lease without the consent of the lessor. It was apparently assumed by the Secretary that the lessor was still a ward and that he might act without consulting his ward. The opinion was by Judge Hook, speaking for the

Circuit Court of Appeals for the Eighth Circuit. The result of the opinion on this point is correctly summarized in the first paragraph of the syllabus as follows:

> The statutory requirement that leases made by Indian allottees of the Cherokee and other civilized tribes in the Indian Territory should be subject to approval by the Secretary of the Interior before being effective conferred on the Secretary only the power of approval or disapproval and gave him no authority to initiate or make a lease, or to change or ignore its provisions, and his approval of an assignment of a lease, made without the consent of the lessor, in direct violation of its conditions, did not validate such assignment.

Senator Clapp, chairman of the Senate Committee on Indian Affairs, a lawyer of much ability and force and thoroughly conversant with the question, while the legislation here involved was being considered by the Senate, stated his views in reference to the constitutionality thereof in the following language:

> The discussion of the right of alienation and restriction upon alienation have always ignored one basic principle, which the court has not met yet, because it has never been presented to the court. A restriction upon alienation can only rest upon one of two conditions. It must be a limitation placed in the grant at the time of the grant; or it must be a limitation resting in the incapacity of the grantee to transact business, as the incapacity of coverture, infancy or lunacy. If

finds that perhaps a majority of the Cherokees are in favor of the provisions found in section 19 of the Act of April 26th, 1906. There is nothing in the record to ascertain how the court arrived at that conclusion.

The Choctaws and Chickasaws have at all times protested against the authority of the government to impose these additional restrictions. We understand that this protest assumed the form of a resolution which should be found either in the possession of the Commissioner to the Five Civilized Tribes, or Commissioner of Indian Affairs or the Secretary of the Interior. We also understand that it ma ybe found among the files in this cause in the Court of Claims. However this may be, no contention can be made that the Choctaws or Chickasaws ever assented to the provision of this act. If the Cherokees have in any wise assented, to that extent their case differs from that of the Choctaws and Chickasaws.

But, as we have before said, we do not believe that the tribal authorities could consent to the imposition of these restrictions upon the individual allotment so as to bind the allottee.

TRIBAL EXISTENCE.

The existence of a tribal government, if in fact one existed, would not impair or affect the rights, privileges or immunities of citizenship. It is sometimes asserted that any mere tribal existence seriously impairs, if it does not wholly destroy the rights, privileges and immunities of

citizenship. The tribal governments have long ceased to exist for any vital purposes. The so-called tribal officials are not tribal officials in fact; the offices these former tribal officials now fill are the creatures of Congress, and offices are held by virtue of an act of Congress and not by virtue of the will of the tribe or because of the selection by the tribe of such persons to fill such offices. They are in the proper sense federal appointees, absolutely without any governmental authority. Tribal existence formerly consisted of a legislative, an executive and a judicial department and of members and citizens owing allegiance to such government and receiving protection in their person and property therefrom.

To say the least of it, the legislative and judicial departments have been abolished; the enforcemetn of tribal laws in any court has been prohibited; the power of taxation has been absolutely suspended; the protection afforded to the property and members of the tribe is wholly a thing of the past. There is no government for the former members of the tribe to owe allegiance to or acept protection from.

The continued tribal existence of the Kickapoo Tribal organization and its recognition by the federal government was urged as sufficient authority to sustain the jurisdiction of the federal court in re Heff, **supra**. The continued existence of the Red Lake Band of Chippewa Indians and the fact that such band sustained tribal relations with the United States was claimed to justify the action of the department and of

a restatement of the law in a corrected or improved orm. The restatement may be with or without material change. A revision is intended to take the place of the law as previously formulated. By adopting it the legislature says the same thing, in effect, as when a particular section is amended by the words 'so as to read as follows.'

The revision is a substitute; it displaces and repeals the former law as it stood relating to the subjects within its purview. Whatever of the old law is restated in the revision is continued in operation as it may operate in the connection in which it is reenacted.

In **Bartlett vs. King,** Dewey, J., said:

'A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must on principles of law, as well as in reason and common sense, operate to repeal the former.'

Though a subsequent statute be not repugnant in all its provisions to a former, yet if it was clearly intended to prescribe the only rule which should govern, it repeals the former statute. Without express words of repeal, a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern." * * *

"* * * The reasonable inference

from a revision is that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time, and that the new statute, being the most recent expression o the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law. Sec. 155:

> A revising statute embracing antecedent general laws on various subjects and reducing them to one system and one text repels all prior statutes upon the same subjects not included in the body of the revision and not exempted by an express clause. Where one act is framed from another, some parts taken and others omitted; or where there are two acts on the same subject, and a later embraces all the provisions of the first and also new provisions, the later act operates, without any repealing clause, as a repeal of the first."

See also Endlich on Interpretation of Statutes, sections 201 and 202.

In the case of the **District of Columbia vs. Hutton**, 143 U. S., page 26, the rule as stated by Mr. Justice Lamar, in the following language, is:

> "We are not unmindful of the rule that repeals by implication are not favored. But there is another rule of construction equally sound and well settled which we think applies to this case. Stated in the language of

this court in **United States vs. Tymen,** 11 Wall. 88, 92, it is this: 'When there are two acts on the same subject, the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' See also **Murdock vs. Memphis,** 20 Wall. 590, 617; **Tracy vs. Tuffy,** 134 U. S. 206, 233; **Fisk vs. Henarie,** 142 U. S. 459."

In the case of **The Paquete Habana,** 175 U. S. 685, the Supreme Court of the United States, speaking through Mr. Justice Gray, states the rule in the same language as above quoted.

In the case of **Fisk vs. Henarie,** 142 U. S. 468, Mr. Chief Justice Fuller, speaking for the Supreme Court of the United States again quotes the language used in the above cases, stating that the rule thus expressed was applicable and decisive of the question involved.

The rule is again stated in the same language by Mr. Justice McKenna in the case of **Henrietta Mining and Milling Co. vs. Gardner,** 173 U. S. 128.

The rule is clearly stated by Justice Miller in the case of **Murdock vs. City of Memphis,** 20 Wall. 616, in the following language:

"The Act of 1867 has no repealing clause, nor any express words of appeal. If there is any repeal, therefore, it is one of implication. The differences between the two sections are of two classes; namely, the change or substitution of a few words or phrases in the latter for those used in the former, with very slight, if any, change of meaning, and the omission in the latter of two important provisions found in the former. It will be preceived by this statement that there is no repeal by positive new enactments inconsistent in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the questions thus propounded for discussion.

A careful comparison of these two sections (set forth in parallel columns, **supra,** pp. 592-593) can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the laws as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of the opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, because complete in itself, and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform."

See also **Columbia Wire Co. vs. Boyce,** 104 Fed. 172.

The rule as stated in America and English Enc. of Law, 2nd Ed. vol. 26, page 733, is as follows:

> "The general rule that where a statute, not merely cumulative of the common law or of previous statutes, and not made to cure the deficiencies thereof, is designed to create a new and independent system, and to dispose of the whole subject of legislation, it is the only law on that subject and without an express repealing clause displaces the old statutes, has been almost universally applied to codes and revisions, except so far as a contrary rule may be laid down by the revision itself. But a general revision of existing laws which are substantially re-enacted operates in a simultaneous repeal and re-enactment; that is, the new statutes are to be construed as a continuance and modification of the laws rather than as an abrogation of the old and a re-enactment of the new ones, and sometimes this is expressly declared by the revising statute."

See also:

Hampton vs. Hickey, 114 S. W. 707;

Davidson vs. Schmid, 124 S. W. 552;

State vs. McCafferty, 105 Pac. 992;

State ex rel Gaston vs. Shields, 130 S. W. 298.

These decision relate to the revision of several laws upon a single subject, as well as to the revision o fa system or the codification into a code of all the laws of the State. Applying this rule to the declaration made in

the first paragraph of the Act, "That from and after 60 days from the date of this Act the status of the lands allotted heretofore and hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows:" it seems to us beyond peradventure that the law as declared in this statute should be the sole and only law relating to or controlling the subject matter under consideration. In other words, the status should be as fixed by the law following the declaration and not by any other or preceding statute, unless specifically continued in force by the provisions of the Act itself.

The Act of May 27th, 1908, as a protection to the full-blooded allottee, substituted for the Secretary's approval the approval of the County Court of the County exercising jurisdiction over the administration of the estate, or in the case of the minor, exercising guardianship jurisdiction.

A new order of things had come to pass; the old court government in Indian Territory and the territorial government of the Territory of Oklahoma had passed away. In lieu thereof there had been established a State Government upon an equal footing with that of the other States of the Union. It was but meet and just that the probate jurisdiction in the State of Oklahoma should be exercised by the probate courts of the State of Oklahoma. This jurisdiction is in the exercise of the police power

reserved to the States and not conferred upon the Federal Government. Congress had no right to reserve this jurisdiction, to be exercised through the National courts or a department of the National Government, and did not undertake to do so.

We therefore agree with counsel for the Cherokee Nation and the United States that the effect of the Act of May 27th, 1908 was to repeal all of the Act of April 26th, 1906, which was not contained in the revision, but that part of the act of April 26th, 1906 imposing restrictions upon the right of the full blood allottees to alienate for a period of 25 years is carried forward into the revision. Even if there had been an unconditional repeal the question as to the constitutionality of said act imposing restrictions upon alienation by full blood allottees would not be a moot one.

The Court of Claims in its 16th finding uses the following language:

> "Since the passage of the Act of April 26th, 1906, **supra**, large numbers of such deeds, contracts to sell, and mortgages of their allotted lands, in violation of said last-mentioned act, are being filed almost daily in the offices of the recorders of deeds of the counties of Oklahoma, where the said lands are situated; and suits have been brought by the United States embracing 25,338 transactions in the United States courts of the State of Oklahoma to cancel said deeds, contracts, and mortgages upon the ground that they are a cloud upon the titles of such Indians to their allotments."

While, for the purpose of this suit, we presume the findings of the Court of Claims must be accepted as true, as a matter of fact, however, this is a gross exaggeration of the number of controversies arising under the provisions of the Act of April 26th, 1906. However, this may be, it is clear from this finding that a large number of conveyances were made after the approval of the Act of April 26th, 1906 and before the bringing of the suits referred to in 1908. The question of the validity of these conveyances made in the interim prevents, in any event, the operation of the repeal so as to constitute the question of the validity of said section 19 a moot one.

BRIEF OF WILLIAM W. HASTINGS, ESQ.

Mr. William W. Hastings has filed a brief in this cause purporting to be on behalf of the Cherokee Nation.

The brief does not disclose the authority he has to determine the policy of the Cherokee Nation in the matter involved, nor what authority the Cherokee Nation has to intervene in this suit or to act for its former members, who are now citizens of the United States and of the State of Oklahoma, and who receive no protection and who owe no allegiance to such nation.

The Government for which Mr. Hastings purports to file this brief and which insists upon the right to determine for its former members, who are citizens of the United States and of the State of Oklahoma, the right of whether they will assent to or controvert the constitutionality

of the acts involved, is described by the Commission to the FIVE CIVILIZED TRIBES, as quoted by this Court, in the case of **Stephens vs. The Cherokee Nation**, 174 U. S. 453, in the following language:

> "The Commission is compelled, by the evidence forced upon them during their examination into the administration of the so-called governments of this Territory, to report that these governments and all their branches are wholly corrupt, irresponsible and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect."

* * * The Cherokee National Government was one of the governments above referred to, and which is now seeking to perpetuate its authority, and to assert its qualification to act as guardian for full fledged citizens of the United States.

What property interest has the Cherokee Nation in the controversy? What interest of any character has it upon which it may assert the right to act for citzens of the United States and of the State of Oklahoma in reference to their individual matters?

It is stated in Mr Hastings' brief (p. 22) that William Brown sues as sole heir of the estate of a deceased son. William Brown sues on his own account as a Cherokee full blood, who is prohibited from alienating, or who is attempted to be prohibited (Section 19 Act of

April 26, 1906) from alienating his allotment, or the land inherited by him, as heir of his deceased son who died intestate.

We concur with counsel in the contention that Brown took only a life estate, but a life estate is property just the same as a fee simple and if the act is applicable to the inherited estate, it is void.

We again agree with Mr. Hastings, however, that the Act of May 27th, 1908, unquestionably repeals Section 22 of the Act of April 26th, 1906, by the substitution of a new and different procedure. This Court, however, has for consideration the determination in connection with this case, the validity of Section 22 in the case of **Marchie Tiger vs. Western Investment Company.**

It is further contended by Mr Hastings that it is the particular province of the State or the Legislative Department to act as "guardian and protector of those who are disabled to act for themselves." Conceding the truth of this contention for the purposes of this argument: how is the compentency of a citizen of the United States, over the age of twenty-one years to be determined The conferring of citizenship in the first instance determines competency, with the right to exercise all the privileges and immunities thereof. The legislative authority has no power to determine that the citizen who has been declared to be competent, is incompetent and to restrain him of his liberty or to interfere with the disposition of his property. This can

be done only upon judicial inquiry and upon the adjudging by a proper tribunal that such person is incompetent and the committing of his property to the custody of a proper guardian. The Legislature may not say that any individual, or class of individuals, is incompetnt and direct the appointment of a guardian. There is no more sacred right than that of liberty of person and to contract with reference to and disposition of property.

In Constitutional government this right can be taken only upon judicial inquiry and adjudication of incompetency.

Mr. Hastings suggests that in **Wiggins vs. Connolly, a prohibition against alienation by minors during minority was added after issuance of patent with the consent of the United States and the tribes, and was sustained.**

Our view of this case is presented in another part of the brief. We desire to say, however, that the right to alienate property by a minor is denied under the laws of every state or country, so far as we are advised. In fact it was for a long time a serious question whether a minor's property could be constitutionally sold under legislative authority by judicial proceedings, for the use and benefit of the minor. Therefore, in taking away the right of the minor to sell during minority, nothing was taken. The last act amounted to nothing more than the withdrawal of legislative authority to the guardian to make sale of the property of the minor upon order of court.

Mr Hastings, throughout his brief, fails to distinguish between tribal and individual property. This is particularly true in dealing with **Cherokee Nation vs. Hitchcock** and **Thomas vs. Gay** (pp. 34-47-53 of brief) and **Lonewolf vs. Hitchcock** (p. 35 of brief).

It is assumed throughout that the authority to deal with tribal property includes the authority to deal with individual property of the individual citizen of the United States.

THE BRIEF FOR THE UNITED STATES.

The body of this brief was prepared before we had an opportunity to inspect the brief filed on behalf of the United States. There are contentions made in said brief as to which we desire to offer some suggestions.

It is urged in support of the constitutionality of Section 19 of the Act of April 26th, 1906 (Brief p. 26) that "the full-blood Cherokee Indians 'are in the main in favor of the extension of the period of restrictions upon alienation of their lands and are in favor of the supervision of the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands.' "

How was this fact ascertained? It is not even suggested that the provisions of the Act were ever submitted to the Cherokee people for their approval, or that any election was ever held in reference to any matter involved in the Act of April 26th, 1906.

It would be singular indeed if the Cherokee government which sought to intervene, and whose officials may perpetuate their own existence by such a result, supported by the numerous officials of the Department of the Interior, could not procure some evidence in some form that some part of the Cherokees were in favor of the law. Is the fact of approval by the Cherokee people material in determining the question of the constitutionality of said Act? Apparently, counsel for the United States and William W. Hastings, Esq. think so, for each urges the above quotation as a reason for sustaining the constitutionality of the Act. If it is material, then the Act must fall without a proper approval. If it is not material, it has no place in the argument. If it is material, the approval can be shown only in legal form and not by the opinion of some person interested in the subject-matter. What consideration would be given to the defense made to the provisions of an initiated bill or proposed constitutional amendment which relid upon the opinion that the majority of the people entitled to vote thereon were in favor of it? Since when has it become permissible to sutsain the constitutionality of an act violative of the Federal or State constitutions, by showing that a majority of some class of voters was, in the opinion of some witness, in favor of the provision?

THE ENABLING ACT.

A comparison is drawn between the Montana Enabling Act and the Oklahoma Enabling Act (Brief for U. S. p. 69), but there is a vital difference between them. Counsel for the United States seems to have fallen into the error (Brief p. 68) of quoting the clause in the Oklahoma Enabling Act relating to **public** lands

and comparing it with the provision of the Montana Act which relates to both Indian and public lands.

In Section 3 of the Oklahoma Enabling Act, the people of Oklahoma are required to disclaim any right, title and interest in and to any unappropriated **public** lands lying within the boundaries thereof, and to lands held by an **Indian tribe** or **nation**. The reservation of jurisdiction in the United States is limited to public lands, the provision being "that until the title to any such **public** land shall have been extinguished by the United States, same shall be and remain subject to the jurisdiction, disposal and control of the United States.

It is clear that it was the intetnion of Congress to draw a distinction between the right reserved over **public** lands and that over Indian lands. The reverse was true in the Montana Enabling Act.

In Conclusion.

Some mention is made in the opinion of the Court of Claims of the right of the government to annul a treaty whenever, in its judgment, the public welfare requires it. This may be true, insofar as it affects politcal relations. The government, however, dealt with the Five Civilized Tribes by grant. An absolute title passed by such grant executed by the principal chiefs and sanctioned and approved by the Federal government. This grant is no more subject to revocation or modification than would be the grant of an individual.

It is respectfully submitted, therefore, that section 19 is violative of the fifth amendment to the federal constitution and void; that section 22 does not extend restrictions upon alienation and is not obnoxious to the fedral constitution for that reason, but if it should be held to extend

restrictions it would be obnoxious to said amendment. That said section 19 should be adjudged for said reason to be void and of no force and effect.

Respectfully submitted,

S. T. BLEDSOE.

EVANS BROWNE.

APPENDICES.

Appendix A.

The Committee of Indian Affairs, to whom was referred the bill (H. R. 10701) to amend Section 6, Chapter 119, United States Statutes at Large No. 24, beg leave to report that they have had the same under consideration and recommend that it do pass without amendment.

The reasons for the pasage of this bill are fully set forth by the report of the Committee on Indian Affairs of the House of Representatives, which report is as follows, and is adopted as the report of your committee:

> "The Committee on Indian Affairs, to whom was referred the bill (H. R. 10701) to amend Section 6, Chapter 119, United States Statutes at Large No. 24, beg leave to submit the following report and recommend that said bill do pass without amendment.
>
> The statute proposed to be amended provided for granting citizenship to all Indians upon receipt by them of their allotments, but made an exception of the Five Civilized Tribes, who at the time, protested, on the ground that they were conducting governments of their own, which would be weakened by such a step. These governments are now completely changed and this reason has disappeared.
>
> Under the operation of the statute referred to the Indians in Oklahoma, such as the Pawnees, the Sac and Foxes, Pottawatomies, Kickapoos, the Cheyennes and Arapahoes, and in the Indian Territory, the Qua-

paws, the Senecas, the Wyandottes, the Ottawas, and the Shawnees and even the Modocs, have all been granted the valuable right of United States citizenship. None of these Indians are so highly advanced as the Five Civilized Tribes, and none so well prepared to enjoy United States citizenship.

The independent self-government of the Five Civilized Tribes has practically ceased. The policy of the government to abolish classes in Indian Territory and make a homogeneous population is being rapidly carried out. To enable the Indians of Indian Territory to properly protect their rights they should be given the right of United States citizenship immedlaiety. They should at once be put upon a level and equal footing with the great population with whom they are now intermingled.

There are about 70,000 Indians in Indian Territory, many of whom are already United States citizens. It is doubtful whether, under the statutes, these Indians can perform any of th eusual personal business engagements which are taking place daily on a vast scale in Indian Territory without a technical violation of the laws requiring supervision of the Indian people. It is true that these laws are regarded by the people of Indian Territory as not applicable to them. But all questions with regard to this matter should be eliminated by giving to them legal rights equal with other men.

By the terms of the act 'For the protection of the people of the Indian Territory, and for other purposes,' the members of the Five Civilized Tribes are authorized to bring

suits in the United States Courts to recover possession of property, they are permitted to vote, and under existing laws they act on juries.

This bill simply extends to the members of the Five Civilized Tribes the same privileges that are enjoyed by other Indians to whom allotments have been made."

Appendix B.

The act of May 8, 1906, passed the House of Representatives on March 9, 1906. As reported by the Committee, the bill did not have the proviso, "Provided further, that until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States." (Congressional Record, Vol. 40, Part 4, page 3598.)

After a discussion of the various provisions of the bill, Mr. Curtis states: "So far as the Indian Territory is concerned, all the Indians have been made citizens of the United States, and they are citizens now. The allotments have all been made to the Seminoles; nearly all to the Creeks. They are being made to the Chickasaws, the Choctaws and Cherokees."

Mr. Finley: How many Indians in the Indian Territory have received their allotments?

Mr. Curtis: That would be very hard to say. There are about 4,000 allotments yet to be made to the Choctaws and Chickasaws, but the patents have not been delivered to those who have been allotted in those two tribes. Nearly 7,000 patents have been delivered to the members of the

Cherokee tribe; nearly all patents have been delivered to members of the Creek tribe, and allotments are complete among the Seminole tribe.

Mr. Finley: Would not the passage of this bill have the effect of delaying it?

Mr. Curtis: It would not have that effect in the Indian Territory, because they were not included in the act of 1887; and the government has made special agreements with the Five Tribes in the Indian Territory and this law would in no way affect them.

Mr. Finley: I understand the gentleman from South Dakota to say a moment ago it would apply to the Indians in the Indian Territory.

Mr. Burke, of South Dakota: I stated I did not know, and I yielded to the gentleman from Kansas, who did.

Mr. Curtis: This law never applied to the Indian Territory.

Mr. Finley: Then, I understand, it does not apply to the Indians in the Indian Territory.

Mr. Burke: It seems not.

Mr. Keifer: I wish to ask the gentleman a question or two.

Mr. Burke: I yield to the gentleman.

Mr. Keifer: I want to know what there is in the bill that he has prepared that excludes it from general operation upon the Indian tribes in the Indian Territory.

Mr. Burke: The gentleman from Kansas has just explained, I thought, that particular point.

Mr. Keifer: A general law is likely to apply generally. Is there any reservation in this bill?

Mr. Curtis: Not in this bill; this is simply an amendment of Section 6 of the act of 1887. The act of 1887 excludes the Indians of the Indian Territory. Now, there is nothing in this bill bringing them within its terms. Therefore, the two acts would be construed together, and under the rules of law it would be held that the original act not applying to the Indians in the Indian Territory, this act amending it would not apply to them. Now, we have special agreements with the Five Tribes, under which allotments are being made to them. We have a bill pending, which will go to conference within a day or two, providing for final settlement of all of their affairs. We have special provisions in the various agreements in regard to the sale of intoxicating liquors, which have not been put in other agreements with Indians in the United States, and they have always been dealt with separately and distinctly. The agreements provide the conditions under which the patents shall be issued, which shall be subject to alienation and when they may be alienated; that homesteads shall not be disposed of for certain periods. As this bill only affects Indians with whom agreements are hereafter to be made, it cannot under any circumstances apply to the members of the Five Civilized Tribes.

. . . . . .

Mr. Burke, of South Dakota: Let me state to the gentleman from Ohio that we have this proviso on the bill: "Provided, further, that after issuance of fee simple patents, all allottees to whom trust patents shall hereafter be issued, shall be subject to the exclusive jurisdiction of the United States." Now, we certainly cannot legislate to change the status of any citizen whose status has been fixed and the Supreme

Court in the Heff case state that we have not that right without consent of the citizen to be affected and the consent of the state within which he resides.

Mr. Keifer: I have no objection to that statement, but it does not cover the objection; it applies only to conditions already fixed; but there are cases that are to come, of applications to be made, allotments to be made in the future, and this may embarrass conditions existing in the Indian Territory; and no matter whether there is a reservation in the act of 1887 or not, there is no reservation in this, and that is what I suggest —that the gentleman put in such a reservation. I am not opposing the bill.

Mr. Curtis: Very few words would cover it, simply providing that the provisions of this act should not extend to the Indians in the Indian Territory.

Mr. Keifer: I suggest that it had better be put so as to avoid any confusion.

. . . . . .

Mr. Curtis: Mr. Speaker, I suggest the following amendment: "Provided, further, that the provisions of this act shall not extend to the Five Civilized Tribes."

Mr. Lacey: In the Indian Territory?

Mr. Curtis: In the Indian Territory.

. . . . . .

Mr. Steenerson: I understand the object of this bill is to apply to those Indians who hereafter, after the passage of the proposed act, shall be allotted lands in severalty.

. . . . . .

Mr. Keifer: Mr. Speaker, the amendment offered by the gentleman from Kansas (Mr. Curtis), I think, has not been reported.

Mr. Speaker: The Clerk will report the amendment.

The Clerk wrote as follows:

"Add on the end of the bill the following:

"And provided further, that the provisions of this act shall not extend to the Five Civilized Tribes."

Mr. Speaker: The question is on agreeing to the amendment.

The question was taken and the amendments were agreed to.

Appendix C.

From Congressional Record, Vol. 33, Part 8, page 6760, under date of June 5, 1900. Title "Indian Allotments:"

Mr. Speaker: Does the gentleman from Wisconsin object to the calling up of the bill by the gentleman from Kansas?

Mr. Cooper: No, Mr. Speaker, I withdraw that objection.

Mr. Curtis: Mr. Speaker, I ask the unanimous consent for the present consideration of the bill (H. R. 10701) to amend Section 6, Chapter 119, United States Statutes at Large, numbered 24.

The clerk read the bill, as follows:

"Be it enacted, etc., that section six of chapter one hundred nineteen of the United States Statutes at Large, numbered 24, page three hundred and ninety, is hereby amended as follows, to-wit: 'After the words "civilized life" in line thirteen of said section six insert the words "and every Indian in the Indian Territory." ' "

Speaker: Is there objection?

Mr. Steele: I ask for an explanation.

Mr. Curtis: Under the act of 1896 allotments

are made to an Indian who becomes a citizen of the United States.

Mr. Lentz: Mr. Speaker, I ask for order, as I want to hear this explanation myself.

Speaker: The House will be in order and gentlemen will take their seats and cease conversation.

Mr. Curtis: Mr. Speaker, the act of 1887, known as the Dawes Allotment Act, provided that when allotments are made to Indians they shall become citizens of the United States. The statute, however, was not made applicable to the members of the Five Civilized Tribes in the Indian Territory, because they had governments of their own, elected officers and owned their own property in common. But since that time agreements have been made with the said Five Tribes. Their tribal governments are to be broken up; provisions have been made for them to take their lands in severalty. The allotments are being made, or will soon be made; they have been given the right to vote in certain elections; they serve on juries; they have the right to bring law suits, etc. The Committee thought it proper therefore to extend over the members of the Five Civilized Tribes the provisions of the act of 1887.

Mr. Snodgrass: Does that make them citizens?

Mr. Curtis: It does.

Mr. Snodgrass: Under the existing treaties between the United States and those Five Tribes have we the right to abolish their tribal government?

Mr. Curtis: They have agreed to it. Agreements with them have been negotiated through the Dawes Commission and three of those agree-

ments have been ratified by Congress and the remaining two agreements passed the House a day or two ago.

Mr. Snodgrass: Already?

Mr. Curtis: Already; and allotments will soon be made to the members of some of the tribes. Work preparatory to allotment is now going on.

There being no objection, the House proceeded to the consideration of the bill; which was ordered to be engrossed and was accordingly read the third time and passed.

On motion of Mr. Curtis, motion to reconsider the last vote was laid on the table.

For a discussion of the reasons for the extension of tribal government see Congressional Record, date of February 28, 1906, Vol. 40, Part 4, page 3120.

Attention is called to the following discussion between Senators McCumber and Long, touching the provisions of the act of April 26, 1906, extending tribal existence:

Mr. Long: There are provisions in the bill now pending for the continuance of tribal relations, for making a definite and complete roll of each tribe which shall govern in the distribution of tribal property.

Mr. McCumber: Yes, but that would not continue the government; that is simply continuing the persons who before had something to do with the government in certain positions for the purpose of carrying out some new provision. It is creating a certain office, if I may say, that is purely a federal office and for the purpose of signing papers.

Mr. Long: The Senator has reference to the government.

Mr. Bailey: If the Senator will permit me, the whole purpose of that is to insure the proper distribution of the property.

Mr. McCumber: Nothing more.

Mr. Bailey: That is all. The tribal relations there are practically destroyed today. The Indians are on their separate allotments, to which they either already have a deed, or to which they are now entitled to receive a deed. They have no longer any tribal court; they still have a tribal government, but after the 4th day of March they resort to the courts of the United States to assert their rights or to protect their rights. Therefore, there is nothing but what the Senator from Kansas (Mr. Long) himself described yesterday as a shell of a government there.

Mr. Long: That is all.

Mr. Bailey: Now, I want to state to the Senator the purpose I have in this, and I make no concealment of it. I am trying to prevent the railroad from obtaining that land.

Mr. McCumber: I think we all agree with the Senator on that.

After concluding the discussion of a possibility of the railroad grant attaching, in the House on consideration of this resolution, Congressional Record, Vol. 40, page 3222, Mr. Curtis concludes as follows:

> "While, in my judgment, this legislation is not at all necessary, because I do not believe that the grant to the railroad attaches, or can attach, yet, in view of the fact that the question has been raised by able lawyers at the other end of the capitol, I think it safe to pass this resolution."

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

WILLIAM BROWN and LEVI B. GRITTS, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, Appellants,

v.

THE UNITED STATES.

No. 331.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This appeal is from a judgment of the Court of Claims dismissing an action brought by appellants in that court to determine the validity of certain acts of Congress restricting the power of Indians to alienate their lands.

Brown and Gritts are full-blood Cherokee Indians. They received allotments of land from the United States under the act of July 1, 1902 (32 Stat., 716),

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which provided for the distribution of a portion of the Cherokee tribal property. Each received both homestead and surplus lands, and Brown received in addition an allotment by inheritance from his son—all under the provisions of the act of July 1, 1902. That act forbade the alienation of homesteads under it during the lifetime of the allottee, not exceeding twenty-one years, and of other lands during the period of five years.

After the passage of the act of July 1, 1902, while all its provisions were still in force, and before Brown or Gritts had attempted to alienate any of their lands, or had brought this suit, Congress passed two other acts for the protection of Indian allotments. The first of these was the act of March 11, 1904 (33 Stat., 65), which empowered the Secretary of the Interior to grant rights of way for pipe lines over lands allotted to Indians under certain regulations. The second was the act of April 26, 1906 (34 Stat., 137), which extended to a period of twenty-five years the time within which all full-blood Indians of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole tribes were forbidden to alienate, sell, dispose of, or encumber any of their lands.

Brown and Gritts are seeking to have this legislation of 1904 and 1906 annulled by the courts and to have the lands allotted to them under the original act of July 1, 1902, adjudged to be free from all restraints upon alienation. They bring this suit under the provisions of certain sections of the Indian appropriation bill of March 1, 1907 (34 Stat., 1015),

which undertook expressly to authorize these appellants to institute actions in the Court of Claims to determine the validity of any acts of Congress passed since the act of July 1, 1902, in so far as such later acts of Congress increase or extend the restrictions upon the alienation of Cherokee allotments, with an appeal to the Supreme Court of the United States to hear and determine the question of such validity.

In this brief we shall set out:

First, the pertinent provisions of all the acts of Congress involved;

Second, the important findings of fact by the Court of Claims; and

Third, the argument for the Government, in which it will be contended (*a*) that the case is moot, and (*b*) that upon the merits the judgment of the court below should be affirmed and the petition dismissed.

I.

Pertinent provisions of the acts of Congress involved.

The act of July 1, 1902 (32 Stat., 716, 717, 726, 727, ch. 1375, secs. 13, 14, 15, 20, and 72), relates to the allotment and alienation of all lands belonging to the Cherokee Tribe of Indians in Indian Territory, except such as are reserved from allotment, and the pertinent sections are as follows:

> SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allotable lands of the Cherokee Nation, as

nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this Act.

SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent (34 Stat., 717).

SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of the descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If,

however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted (34 Stat., 718).

SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes and for mineral purposes may also be made with the approval of the Secretary of the Interior and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands (34 Stat., 726, 727).

Of the same general character with the act of July 1, 1902, but differing in some features of their restrictions upon alienation, there were passed certain other acts for the allotment and protection of Indian lands at about the same time. Among these is the Seminole act of July 1, 1898 (30 Stat., 567, 568, ch. 542); the Creek act of March 1, 1901 (31 Stat., 861, 862, 863, ch. 676, sec. 7); the Supplemental Creek act of June 30, 1902 (32 Stat., 500, 503, ch. 1323, sec. 16); and the Choctaw and Chickasaw act of July 1, 1902 (32 Stat., 641, 642, 643, ch. 1362, secs. 12, 16).

The act of March 11, 1904 (33 Stat., 65, ch. 505), which is one of the statutes whose validity is challenged in this case, related to all the Five Civilized Tribes, and the pertinent provisions are as follows:

> That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through . . . any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided*, That the construction of lateral lines from the main pipe line establishing connection with oil and gas

> wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company. . . . *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this Act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper. (33 Stat., 65, ch. 505.)

Another act of 1904 (April 21, 1904, 33 Stat., 189, 204, 205, ch. 1402), while not directly involved in this case, is important as distinguishing restrictions between members of the Five Civilized Tribes, including Cherokees, who are of Indian blood and members of such tribes who are not of Indian blood, thus indicating that Congress was coming to realize that the degree of Indian blood was a proper basis of classification in imposing restrictions upon the alienation of lands, those of Indian blood being regarded as needing greater protection against the improvident alienation of their allotments than other classes within the tribes. This statute also authorized the removal of all restrictions, except as to minors and except as to homestead lands, with the approval of

the Secretary of the Interior, under such rules and regulations as he might prescribe, and under this act the restrictions upon the alienation of a part of the surplus lands of the appellant Brown and upon all the surplus lands of the appellant Gritts had been in fact removed when this suit was brought in the Court of Claims (Finding XI, 44 Court of Claims Reports, p. 293, Rec., 26, 27). The pertinent provisions of this act are as follows (33 Stat., 204, ch. 1402):

> And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded.

The act of April 26, 1906 (34 Stat., 137–148; ch. 1876, secs. 19, 20, 22, and 23), the validity of which is also challenged in this case, put the law in its latest

form before the present suit was begun, and the relevant part of this statute reads:

> SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed;

but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee (34 Stat., 144).

SEC. 20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided*, That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further*, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory (p. 145).

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and

convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe (p. 145).

SEC. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner (p. 145).

The act of March 1, 1907 (34 Stat., ch. 2285, pp. 1015, 1028), which is the jurisdictional act expressly authorizing the appellants Brown and Gritts to bring this suit for the purpose of testing the validity of all acts of Congress passed since the original allotment of the Cherokee lands by the act of July 1, 1902, in so far as such later acts increase or extend the restrictions

upon alienation, is to be found in the Indian appropriation bill of March 1, 1907, and reads as follows:

> That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the Act of July first, nineteen hundred and two, entitled "An Act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any Acts of Congress passed since the said Act of July first, nineteen hundred and two, in so far as said Acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said Act of July first, nineteen hundred and two.
>
> And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine and adjudicate each of said suits.

> The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.
>
> Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of the said acts, authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said Act of July first, nineteen hundred and two. (34 Stat., 1028.)

After this jurisdictional act was passed, and after this suit had been commenced under it, Congress passed the act of May 27, 1908 (35 Stat., 312, 315, ch. 199, secs. 1, 2, 8, and 9). This last act on the subject of alienation of Indian lands provides that all lands, including homesteads, of intermarried whites and of mixed-blood Indians having less than half Indian blood, among the Five Civilized Tribes (including Cherokees), shall hereafter be free from all restrictions on alienation or incumbrance; and that all lands, except homesteads, of mixed-blood Indians

having half or more than half and less than three-quarters Indian blood, among such tribes, shall be free from such restrictions; but that all homesteads of mixed-blood Indians having half or more than half Indian blood, and *all allotted lands of full-blood Indians or of mixed blood of three-quarters or more Indian blood shall not be subject to alienation or any incumbrance prior to April 26, 1931*, except with the approval of the Secretary of the Interior, and *all inherited lands shall not be subject to alienation except with the approval of a court having jurisdiction of the estate of the allottee.*

This last act of Congress on the subject expressly continues the restrictions upon the alienation of any lands held by a full-blood Indian of either of the Five Civilized Tribes. The appellants Brown and Gritts belong to this class. Under the original allotment act of July 1, 1902, these full-blood Indians could not alienate their homesteads for twenty-one years, nor any other lands, whether allotted to them or inherited, during the period of five years. (See secs. 13, 14, and 15 of the act of July 1, 1902.) Under the act of April 26, 1906, these full-blood Indians could not alienate any lands allotted to them, for a period of twenty-five years, nor any lands inherited by them, except with the approval of the Secretary of the Interior. (See secs. 19 and 22 of the act of April 26, 1906.) So, under this last act of May 27, 1908, these full-blood Indians can not alienate any lands allotted to them before April 26, 1931, except with

the approval of the Secretary of the Interior, nor any lands inherited by them unless approved by a court having jurisdiction of the settlement of the estate of the deceased allottee. (See secs. 1 and 9 of the act of May 27, 1908.)

This act of May 27, 1908, was passed after the jurisdictional act of March 1, 1907, which authorized the bringing of this suit, and after this suit was begun. It expressly continues the restrictions upon the alienation of all lands held by any full-blood Indian of either of the Five Civilized Tribes, including the Cherokees, and including the appellants Brown and Gritts, and neither this act itself nor any legislation of Congress authorizes the bringing of any suit to test the validity of the act of May 27, 1908. The pertinent provisions of that act are as follows:

> SEC. 1. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than

half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma (35 Stat., 312).

SEC. 2. That all lands other than homesteads allotted to members of the Five Civil-

ized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by a guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided,* That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further,* That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years (35 Stat., 312, 313).

SEC. 8. That section twenty-three of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of the said section, the words "or a judge of a county court of the State of Oklahoma."

SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of

said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section. (35 Stat., 315).

II.

Important findings of fact by the Court of Claims.

The facts in this case are to be ascertained solely from the findings of the Court of Claims, for all allegations in the petition were denied by the United States. (Rec., 14.)

The most important of these findings of fact are as follows, designating them by the numbers used in the court below (Rec., 19, *et seq.*):

I. Of the total tract of land (14,375,125 acres) conveyed to the Cherokee Nation under the treaties of February 14, 1833, and December 29, 1835, there remained undivided as the property of that nation until the act of July 1, 1902, providing for allotments, was passed, 4,420,000 acres.

II. When the Indian roll of the Cherokee Nation was completed on March 4, 1907, it contained the names of 41,798 Cherokees, of whom 8,698 are of the full-blood.

III. The act of July 1, 1902, providing for the allotment of lands of the Cherokee Indians, was submitted to a vote of the Cherokee people, ratified on August 7, 1902, and the ratification thereof certified and proclaimed on August 12, 1902.

(Findings IV and V refer to the completion of the allotments and set out the forms of certificates and patents issued.)

VI. Under the provisions of the act of July 1, 1902, there were allotted to the appellants Brown and Gritts certain tracts of lands as their homesteads,

and there were also set apart and allotted to each of them, in accordance with the said act, certain other tracts of land designated as "surplus allotments."

(Finding No. VII merely recites the terms of the act of March 11, 1904, with respect to rights of way for pipe lines through Indian lands; No. VIII contains the pertinent sections of the act of April 26, 1906, with respect to the alienation of lands; No. IX finds that the Secretary of the Interior has prepared and promulgated certain regulations under the act of April 26, 1906; and No. X recites the jurisdictional act of March 1, 1907, under which this suit was brought.)

XI. The court finds that William Brown and Levi B. Gritts, the petitioners below, and the appellants here, are the identical persons named in the jurisdictional act of March 1, 1907; are enrolled as full-blood citizens of the Cherokee Nation, and have received allotment certificates and patents for their respective shares of Cherokee tribal lands under the act of July 1, 1902; and that William Brown inherited an allotment of land from his son who was an original allottee under the act of July 1, 1902.

XII. The court finds that *Brown and Gritts have never been granted any authority to represent the Cherokee Nation or any of the enrolled citizens thereof*, except as provided by the terms of the jurisdictional act of March 1, 1907.

(Finding No. XIII goes merely to the fact that the lands of Brown and Gritts are suitable for grazing and agricultural purposes only.)

XIV. The court finds that notwithstanding the institution of this suit by Brown and Gritts, *the full-blood citizens of the Cherokee Nation to whom lands have been allotted are in the main in favor of the extension of the period of restriction upon alienation*, and are in favor of the supervision of the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands, as they are uneducated and unable to speak the English language and, without governmental supervision, are *incompetent to represent and protect themselves in the sale or leasing of their allotted lands.*

(Finding No. XV states that before the commencement of this suit the appellant Brown had filed in the Supreme Court of the District of Columbia a bill attacking the validity of the act of April 26, 1906.)

XVI. The court finds that prior to the passage of the act of April 26, 1906, the validity of which is challenged in this case, *many full-blood Indians of the Cherokee Nation had been induced by designing persons to execute deeds of their allotted lands and otherwise to encumber their allotments*, in violation of the act of July 1, 1902, *at grossly inadequate compensation;* and that since the passage of the act of April 26, 1906, large numbers of such deeds, in violation of that act, are being filed almost daily in the offices of the recorders of deed of the counties of Oklahoma, and suits have been brought by the United States to cancel such deeds, embracing 25,338 transactions of this character.

III.

ARGUMENT.

A.

This case is moot and there is nothing upon which a judgment of the court can operate.

Before discussing the merits of the controversy presented by this appeal, to wit, the constitutional power of Congress to extend the restrictions upon the alienation by full-blood Cherokee Indians of their allotted or inherited lands, we desire to call attention to an important question which arises at the very threshold of the case.

The sole authority for the bringing of this suit is a certain provision in the Indian appropriation bill of March 1, 1907. (34 Stat., ch. 2285, pp. 1015, 1028.) An examination of that provision (Rec., 26) and of the form and contents of the petition and prayer filed under it (Rec., 1–12) will clearly show that this case presents merely a moot question to the court.

The case is moot for two reasons:

First. *Because it merely asks the judgment of the court upon the constitutionality of certain acts of Congress and presents nothing upon which that judgment can operate; and*

Second. *Because the inquiry is limited to acts of Congress passed between July 1, 1902, and March 1, 1907 (when the act authorizing this suit was passed), and since that date Congress has by the act of May 27, 1908, renewed*

and extended substantially the same restrictions upon the alienation of Cherokee lands involved, and these restrictions would still be in force whatever the judgment might be in the present case.

As to the first reason, it will be observed that the appellants Brown and Gritts have not attempted to alienate or encumber their lands contrary to the provisions of the acts here involved. No deed, mortgage, lease, or other conveyance is involved. No rights of third parties have intervened. This is not a suit to quiet title, or in mandamus to require a recorder of deeds to register a transfer of land, or in specific performance under a contract to sell, or for the purchase price of property sold. The whole purpose of the suit, as declared in the act authorizing it, is "to determine the validity of any acts of Congress passed since the said act of July 1, 1902, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens."

In other words, Congress, in 1902, having passed an act providing for the allotment in severalty of Cherokee lands to members of the Cherokee tribe, with restrictions upon the rights of the allottees or their heirs to alienate such lands, and having, in 1904 and 1906, passed other acts affecting such lands, proceeds in 1907 to authorize a special suit to be brought submitting to the courts the question as to the validity of its previous legislation. While in form this action

makes the United States defendant, in substance it presents nothing more than the curiosity of Congress to find out whether or not certain of its acts are constitutional. So far as the essence of the case is concerned it might with equal propriety be presented to the Court of Claims, and ultimately to this court, in the form of a resolution of Congress submitting to the judicial branch of the Government the question as to the effect and validity of certain acts of the legislative branch.

The pleadings and all the circumstances connected with this suit, as disclosed by the record, show conclusively that it is in no sense an adversary proceeding in which any of the parties to it have an actual present interest. And, even if they had some property right immediately threatened, we submit that there are appropriate remedies and courts provided by general laws for the enforcement of such rights. Litigation of the character presented by this case ought not to be encouraged. Here we have, not a suit at law or in equity in which a judgment can be rendered for the recovery of some claim, or commanding or restraining some act, but simply an academic question submitted to the court. Nor will it do to say that the petitioners below had already brought an action in the Supreme Court of the District of Columbia against the Secretary of the Interior (Rec., 9–10) to enjoin that officer from carrying into effect regulations in furtherance of the acts of Congress extending restrictions upon the alienation of the Indian lands here involved, and that the present case

is merely substituted for the former one which might have been prosecuted. The answer to this is, that the court can not here inquire into the sufficiency of the cause of action set up in the injunction suit, if any cause of action there existed, and, further, that, even if the appellants in the present case could have maintained a real suit in some court, this fact does not justify the bringing of a moot case in another court.

More than this, it appears from the jurisdictional act itself, under the authority of which the case at bar was begun, that Congress did not intend to substitute a new action against the United States for the one already pending in the District Supreme Court against the Secretary of the Interior. The act authorizing the present proceeding does not mention the other case, nor require the dismissal of it. In fact, the jurisdictional act merely permits and empowers Brown and Gritts to bring this present proceeding, and the record shows (Rec., 10) that the injunction suit was left pending when the jurisdictional act was passed. It follows, therefore, that even if these appellants have a cause of action to determine the validity of the acts of Congress involved the place to assert it is not in this case, where they are merely asking the opinion of the courts, but in the injunction suit, in which they are at least asking a judgment.

This unusual and, we think, unwarranted method of testing the validity of acts of Congress ought not to be sanctioned, not only because it attempts to impose upon the courts duties inconsistent with the limitations of judicial power as defined by the Consti-

tution, but because if Congress may, by resolution or act, submit to this court questions as to the construction or validity of its own legislation, it may often happen that the most numerous class of those who are really interested in and affected by the legislation will not be parties to the suit.

In the case at bar public funds are to be expended for the presentation of both sides of the question involved, and though a portion of these funds is held by the United States in trust for the beneficiaries under the Cherokee Allotment Act (Rec., 26), it appears that *the full-blood Cherokee Indians "are in the main in favor of the extension of the period of restriction upon the alienation" of their lands* and are *"in favor of the supervision of the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands,"* as provided for in the very act whose validity is here attacked. (Rec., 28.) And not only does no Cherokee Indian join the appellants in this suit, but the Cherokee Nation, through its principal chief, and its attorney in fact, has intervened in this proceeding and states to the court that the Cherokee Nation being "directly interested in protecting its own citizens, particularly the less educated and more dependent class, the full-blood citizens," desires to have the constitutionality of the acts here complained of sustained and says that the appellants herein "do not represent the Cherokee Nation or any of the enrolled citizens thereof, other than themselves, and are without authority to appear for or to represent any of them " (Rec., 18.)

It is not meant to suggest here any question as to the good faith of those who have brought this proceeding, or secured the passage of the special act which authorizes it, but it is submitted that a mere friendly suit arranged for the sole purpose of presenting a question of law by Congress to the courts, without the intervention of any parties who assert a present cause of action, is a moot case, and no jurisdiction of it should be accepted.

The second reason why this case is moot is shown by the fact that Congress itself after the passage of the act authorizing this suit and after this suit was begun, that is to say on May 27, 1908 (35 Stat., 312, 315), passed another act providing that no allotted lands of full-blood Cherokee Indians shall be alienated or encumbered prior to April 26, 1931, and that no inherited lands of such Indians shall be alienated except with the approval of a court having jurisdiction of the estate of the allottee.

It follows, therefore, that even if the act of April 26, 1906 (34 Stat., 137–148), which extended previous restrictions, should be held unconstitutional, there would still continue substantially the same restrictions under the act of 1908, which are not and can not be attacked in this case. In effect, the act of 1908, further extending the restrictions upon the alienation of Cherokee lands, repeals the act of 1906 so far as alienations in the future are attempted and repeals the jurisdictional act of March, 1907, under which the present suit was brought. In other words, we have this situation: Congress in one year passes a

certain act respecting the alienation of Indian lands, the next year it passes another act providing for a test in the courts of the constitutionality of the first act, and then in the third year passes still another act reestablishing practically the same restrictions, without authorizing any suit to test their validity. This clearly demonstrates not only that the present case is moot and nothing would be accomplished by a decision of it, but that Congress itself now considers the whole matter moot.

B.

Upon the merits the judgment below, dismissing the petition, should be affirmed.

Upon the merits of the case the Government contends that the acts of Congress the constitutionality of which is here challenged, to wit, the act of March 11, 1904 (33 Stat., 65, ch. 505), authorizing the Secretary of the Interior to grant rights of way for pipe lines over Indian lands, and the act of April 26, 1906 (34 Stat., 137–148), extending the restrictions upon the alienation of certain Cherokee lands, were a valid exercise of the power of Congress in the protection of the Indians and their property.

First, as to the act of March 11, 1904. It may well be doubted whether in the jurisdictional act authorizing this suit it was ever intended to have questioned the validity of the Interior Department's regulations with respect to pipe lines. The jurisdictional act, it will be recalled (Rec., 26), authorizes the appellants Brown and Gritts to institute suit in the Court of

Claims "to determine the validity of any acts of Congress" passed since the original allotment act of July 1, 1902, "in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens."

Now this act of March 11, 1904, authorizing the Secretary of the Interior "to grant a right of way in the nature of an easement, for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas" through lands allotted to individual Indians, can scarcely be called a restriction upon alienation unless it be in the sense that the Indian allottee can not thereafter grant the same right of way. The authorization of pipe line rights of way is rather an allowance of alienation than a restriction upon it, and the act authorizing this suit proposes a test of the validity of such acts only as limit the right of the Indian allottee to dispose of his lands. In any event, the act authorizing rights of way for pipe lines over Indian lands is peculiarly for the benefit and protection of the Indian owner. The moneys received therefrom are paid to the allottee, and when the rights of way run through unallotted lands the damages are paid into the tribal funds. For the construction of lateral lines, which may be done without the approval of the Secretary of the Interior, there must be secured the consent of the allottee himself. In no respect does this act impose the slightest hardship or deprivation upon the Indian allottee. It is all designed in his interest

alone. But aside from this, it seems quite clear that the act as to pipe lines is not before the court, for the reason that Congress did not submit any question on that subject.

Next, as to the act of April 26, 1906. This is the only statute whose constitutionality is actually involved in this proceeding. It is set out in full in the statement, *supra*. In brief, and in so far as this case is concerned, it provides that no full-blood Indian of the Cherokee Tribe shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him, for a period of twenty-five years from and after the passage and approval of the act, and that no full-blood adult heir of any deceased Cherokee Indian shall have power to convey the lands inherited except with the approval of the Secretary of the Interior. The only difference between this act and that of July 1, 1902, under which the original Cherokee allotments were made, and under which the appellants, Brown and Gritts, secured their lands, is that the act of 1902 made the period of restrictions upon the alienation of surplus lands five years, whether held by the allottee or his heirs, and upon the alienation of homesteads twenty-one years, while the act of 1906 fixes the limit on all lands held by the allottee, whether homestead or surplus lands, at twenty-five years, and authorizes the conveyance of lands by the heirs of an allottee upon the approval of the Secretary of the Interior. As pointed out heretofore, the restrictions in the act of 1902 were in full force and

effect when the act of 1906 was passed. The latter statute merely extended the period of restrictions with some modifications.

The exact question in the case therefore is as to the constitutional power of Congress in dealing with full-blood Cherokee Indians still maintaining their tribal relations, and before the rights of any third parties have intervened, to extend for a further period the restrictions upon the alienation of the lands granted to them by the United States.

It is not necessary to recite the history of the Government's relations with the Indians, or even with the Cherokees in particular. They held their original territory in North Carolina and Georgia by right of occupancy only, with the fee in the United States. (*Mitchel* v. *United States*, 9 Peters, 711; *Clark* v. *Smith*, 13 Peters, 195; *United States* v. *Cook*, 19 Wall., 591; *Cherokee Nation* v. *Georgia*, 5 Peters, 1; *Beecher* v. *Wetherby*, 95 U. S., 517; *United States* v. *Kagama*, 118 U. S., 375.) The new lands in the west which they acquired by patent to the Cherokee Nation, were conveyed "*in exchange*" for the lands they had formerly occupied in the east. (4 Stat., 411; 7 Stat., 311; 7 Stat., 414; 7 Stat., 478; Lands of the Cherokee Nation, 1892, pp. 415–424.) When the Cherokees removed to Indian Territory, where they have continued to reside ever since, they held their tribal lands by the ordinary Indian title of occupancy, "assigned to them by the United States, as a place of domicile for the tribe" to be "held with the assent

of the United States and under their authority." (*U. S.* v. *Rogers*, 4 Howard, 567.)

The plenary power of the United States over the Indians so long as they maintain tribal relations, and particularly over their lands, has always been recognized. It arises not only out of the grant of power to Congress in Article I, section 8, of the Constitution, which declares that "Congress shall have power * * * to regulate commerce * * * with the Indian tribes," and in article 4, section 3, which provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," but out of the moral obligation of a civilized and superior nation to protect dependent and uncivilized peoples whom it has dispossessed of their domain.

As to the power of Congress to pass the act of April 26, 1906, we submit the following propositions:

> *First*,—treating these full-blood Cherokees as Indians, Congress had power to put any restrictions whatever and for any length of time upon their right to alienate their lands, so long as the interests of third parties had not intervened.
>
> *Second*,—no citizenship was ever conferred upon the Indians involved in this case.
>
> *Third*,—if any citizenship was conferred, it was only a limited or qualified federal citizenship in the territory and not inconsistent with the continued supervision over the alienation of their lands.

Fourth,—Congress never intended by the grant of citizenship to surrender its power to protect these Cherokee Indians, and especially to protect their property interests, for it has expressly continued their tribal government.

Fifth,—treating these full-blood Cherokees as incompetent citizens of a territory, Congress had power to designate them as a class who need its special protection in the disposition of their property.

We shall discuss these five propositions in their order.

FIRST.

Treating these full-blood Cherokees as Indians, Congress had power to put any restrictions whatever and for any length of time upon their right to alienate their lands, so long as the interests of third parties had not intervened.

From the very earliest times the United States in dealing with Indians has asserted the right to control the alienation of their lands at any time, so long as the lands were held by Indians. This power has been exercised time and again, not only by treaties and acts of Congress imposing conditions contemporaneous with the grants, but by statutes passed after title had vested in the Indians and after such title had become alienable, *except* for the restrictions upon alienation imposed by such subsequent legislation.

Mr. Justice Gray in *Jones* v. *Meehan* (175 U. S., 1) traces the interesting history of these statutes, together with the long line of cases involving the alienation of Indian lands and puts the proposition

beyond dispute, that Congress may at any time before an Indian has parted with an alienable estate in lands granted him by the Government, interpose limitations upon his disposition of the lands and protect him from his own improvidence.

As early as July 22, 1790 (1 Stat., 137, 138, ch. 33, sec. 4), Congress passed an act declaring that "no sale of lands made by any Indian or any nation or tribe of Indians within the United States shall be valid to any person or persons, or to any State," unless executed by some treaty under the authority of the United States.

On March 1, 1793, another act was passed, and the word "Indian" in the singular was omitted, the act providing that "no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians within the bounds of the United States shall be of any validity in law or equity unless the same be made by treaty or convention entered into pursuant to the Constitution." (1 Stat., 330.)

But in the still later acts of May 7, 1796, and March 3, 1799, the word "Indian" in the singular was again repeated and the act read as follows:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the Constitution. (1 Stat., ch. 46, p. 746.)

This identical language was repeated in the first permanent enactment upon the subject by the act of March 30, 1802. (2 Stat., 143.) And this remained the law until June 30, 1834, when Congress again left out the words "any Indian" and made the act read that "no purchase, etc., of lands, etc., of any Indian, nation or tribe of Indians, shall be of any validity," etc.

Thus for forty-four years it was unlawful for any individual Indian to sell his lands and for thirty-eight years even to lease or otherwise convey any of his lands except under the authority of the United States. And this authority over the disposition of lands belonging to individual Indians was exercised by Congress without respect to the terms or conditions of previous grants or treaties, and the constitutionality of such acts was not only never disputed, but it was expressly assumed in *Jones* v. *Meehan*, *supra*. In that case the court decides, first, that when the United States in a treaty cedes a tract of land to a chief or another member of a tribe the treaty itself converts the lands described into individual property, and unless the grant is accompanied by words limiting its effect it is equivalent to the conveyance of a complete title in fee simple; and, second, that where, as in that instance, Congress had not by any other act, either contemporaneous or subsequent, restricted the right of alienation, the Indian grantee had full power to dispose of his lands. The only reason why the learned justice who wrote the opinion in *Jones* v. *Meehan* took occasion to examine the

statutes from 1790 to 1834 was to ascertain whether or not any act of Congress was in force subsequent to the last-named date which would limit the right of the Indian chief whose lands were there involved and who had acquired them under the treaty of October 2, 1863, to lease them, as he had attempted to do, under the facts disclosed. Not finding any such statutory limitation, and finding that the Indian chief had attempted to make two leases, the court decided in favor of the first one and against the second, even though Congress, after the rights of a third party had intervened, undertook to control the disposition of the land. The court concluded its discussion of these statutes against alienation with these words:

> But the inference appears to us to be irresistible that Congress did not intend that there should thenceforth (that is after 1834) be any general restriction upon the alienation by individual Indians of sections of land reserved to them respectively by a treaty with the United States. And this view is confirmed by the reenactment of the provision, in the very words of the act of 1834, in section 2116 of the Revised Statutes, etc.

It thus appears to have been conceded in *Jones* v. *Meehan* that Congress might at any time renew restrictions against the disposition of lands held by individual Indians, and if this be true it follows conclusively that Congress had full power in 1906 to extend the restrictions which it had imposed in 1902 upon the alienation of their lands by full-blood Cherokees whose property was still in process of allot-

ment, and who were still maintaining their tribal relations.

In *Smith* v. *Stevens* (10 Wall., 321) the precise question involved in the case at bar, stating it in terms most favorable to the contention of the appellants, to wit, whether Congress may by subsequent legislation control the disposition of lands granted to an Indian and still under his ownership, was before this court.

By a treaty of June 3, 1825, between the United States and the Kansas Nation of Indians (7 Stat., 245), it was provided in the sixth article thereof, that there should be reserved for the benefit of each of the half-breeds named therein (the defendant Victoria Smith being one), a certain specified allotment of land out of the quantity ceded by the nation to the United States. The eleventh article of the treaty contained the stipulation that the nation should not sell these lands without the permission of the Government, and one of the questions in the case was whether or not this prohibition applied to individual members of the tribe, *including* the half-breeds mentioned. But the court said: "It is, however, not necessary for the purposes of this suit to decide this point, as the deed in question was made after the passage of the act of Congress of the 26th day of May, 1860, which relieves the subject of all difficulty." (10 Wall., 325.) This statute of 1860, *passed thirty-five years after the grant* to Victoria Smith, forbade future disposition of the lands granted, except by the Secretary of the Interior on the request

of the party interested, and the court found that this act provided the only method by which the lands could be conveyed; that the sale attempted to be made in another way was void, and that the deed gave no title to the purchaser. This case is cited with approval in *Jones* v. *Meehan* (175 U. S., 1, 18, 19).

In the case of *The Kansas Indians* (5 Wall., 737, 757) this court, in speaking of the right of Congress over lands belonging to Indians, put the general doctrine thus:

> As long as the United States recognizes their national character, they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws.

In *Cherokee Nation* v. *Southern Kansas Railway Co.* (135 U. S., 641, 653) the court said:

> From the beginning of the government to the present time, they [the Indians] have been treated as "wards of the nation," "in a state of pupilage," "dependent political communities," holding such relations to the general government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation* v. *Georgia* (5 Pet., 1, 17), "are considered by foreign nations, as well as by ours, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility."

In *Cherokee Nation* v. *Hitchcock* (187 U. S., 294) the Supreme Court, referring to the case of *Stephens* v. *Cherokee Nation* (174 U. S., 445), said:

> The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate * * * directly for the protection of the tribal property, was in that case reaffirmed (p. 306).

And again:

> The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts (p. 308).

The relation between the Government of the United States and the Indians has often been likened to that of guardian and ward, and it has often been said that anything which a guardian and a court of probate or of chancery may do for a ward Congress may do for the Indians so long as their tribal relations continue. (*Worcester* v. *Georgia*, 6 Peters, 515; *Elk* v. *Wilkins*, 112 U. S., 94, 96; *United States* v. *Kagama*, 118 U. S., 375; *Lone Wolf* v. *Hitchcock*, 187 U. S., 553; *United States* v. *Rickert*, 188 U. S., 432.)

In *United States* v. *Kagama* (118 U. S., 375, 384) this court said:

> From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, *there arises the duty of protection, and with it the power.*

This has always been recognized by the Executive and by Congress, and by this court whenever the question has been raised. In the well considered case of *Beck* v. *Flournoy Co.* (65 Fed., 30, 34) this language is used:

> These limitations upon the power of the Indians to sell or make contracts respecting land that might be set apart to them for their individual use and benefit were imposed to protect them from the greed and superior intelligence of the white man. Congress well knew that if these wards of the nation were placed in possession of real estate, and were given capacity to sell or lease the same, or to make contracts with white men with reference thereto, they would soon be deprived of their several holdings; and that, instead of adopting the customs and habits of civilized life and becoming self-supporting, they would speedily waste their substance and very likely become paupers. The motive that actuated the lawmaker in depriving the Indians of the power of alienation is so obvious, and the language of the statute in that behalf is so plain, as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatsoever in lands situated within Indian reservations that might be allotted to Indians.

The key to the whole matter is found in the language used by this court in the *Kagama* case, *supra*, to the effect that where there is a duty of protection to the Indians there arises the power to discharge it.

SECOND.

No citizenship was ever conferred upon the Indians involved in this case.

The chief claim of counsel for appellants in this case is that Brown and Gritts had become citizens of the United States, and that in some way this prevents Congress from further restricting the alienation of their lands. In the first place it is not clear that they have ever become citizens. Certainly Indians are not citizens under the Fourteenth Amendment, because they are not born "subject to the jurisdiction" of the United States and they are not "naturalized," because naturalization means the adoption of citizens of a foreign state and the Indian tribes are not foreign states within this view of the Constitution. (*Cherokee Nation* v. *Georgia*, 5 Peters, 1; *Holden* v. *Joy*, 17 Wall., 211, 242; *Elk* v. *Wilkins*, 112 U. S., 94.)

Certainly they have not been made citizens by the act of March 3, 1893 (27 Stat., 612, 645), which provides that the consent of the United States is given to the allotment of lands in severalty to individuals among the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles, and that upon the allotment being made the individuals to whom the same may be allotted "shall be deemed in all respects citizens of the United States." These allotments, however, were made by the tribes themselves and not by the United States. Furthermore, neither Brown nor Gritts took any land under this allotment. Their

lands were secured under the allotment provided for in the act of July 1, 1902 (32 Stat., 716, 717, 726, 727, ch. 1375), and *this act contains no clause conferring citizenship.* The general policy of Congress has been not to grant citizenship in any case until the tribal relations and governments have ceased. This is indicated by the dealings with the Choctaws, Chickasaws, Creeks, and Seminoles, and it is not supposable that any different rule was intended to obtain in the case of the Cherokees. (30 Stat., 513, 518, 567.)

But appellants' chief reliance with reference to citizenship will doubtless be upon the general allotment act of February 8, 1887, as amended by the act of March 3, 1901. (24 Stat., 388, ch. 119; 31 Stat., 1447, ch. 868.)

The General Allotment Act of February 8, 1887, provided:

> SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian

born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property. (24 Stat., 390.)

SEC. 8. That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order. (24 Stat., 391.)

The act of March 3, 1901 (31 Stat., 1447; ch. 868), amended the above section 6 thus—

That section six of chapter one hundred and nineteen of the United States Statutes at Large numbered twenty-four, page three hundred and ninety, is hereby amended as follows, to-wit: After the words "civilized life" in line thirteen of said section six insert the words "and every Indian in Indian territory."

But this same section 6 was again amended by the act of May 8, 1906 (34 Stat., 182; ch. 2348), so as to read as follows:

> SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and

> capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the Indian Territory. * * *

Of the above legislation it will be noted that it embraces in all its three stages two different cases to which two different rules were applied. The first case is that of Indians receiving allotments under the act of February 8, 1887, itself; and concerning such allotments it was declared that they should "have the benefit of, and be subject to, the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction, the equal protection of the law." That case and the rule just declared concerning it are not here involved, because none of the Cherokees have received allotments under the act of February 8, 1887. The second case covered by that statute is treated in the following sentence, quoted as it stood before the amendment of March 3, 1901:

> And every Indian born within the territorial limits of the United States to whom allotments

> shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property. (Act of February 8, 1887, 24 Stat. 388, on p. 390; Ch. 119, Sec. 6).

The suit at bar is not affected by this form of section 6 of the act of February 8, 1887, because section 8 of the same act declared:

> That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, (and other Indians named.) (Id. sec. 8, 24 Stat., 391).

The question in the present suit concerning Cherokee citizenship is made by the amendment of March 3, 1901 (31 Stat., 1447), which added the words "and every Indian in Indian Territory" to section 6, at the end of the clause "and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his

residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life." It will be claimed that this addition of 1901 extended citizenship to every Indian in the Indian Territory, independently of his having taken up his residence apart from his tribe and "adopted the habits of civilized life," and even independently of his having received an allotment.

It is submitted, however, that the effect of the amendment of 1901 was only to extend the general clause, at the end of which the amendment was inserted, to Indians who had come to reside apart from their tribe and had adopted the habits of civilized life, although they dwelt in the Indian Territory. In other words, under the amendment of 1901 Indians in Indian Territory who lived by themselves and in a civilized way were put under the same rule as elsewhere. It is incredible that Congress intended that all Indians in Indian Territory should be made citizens in 1901 without their having either received allotments or taken up the habits of civilized life. This view is the only one which will make consistent the various acts of legislation on the subject. The act of February 8, 1887, contained in section 8 a provision that it shall not apply to certain Indians in the Indian Territory, including the Cherokees, while the amendment of 1901, without in terms repealing said section 8, declares that all Indians in the Indian Territory shall become citizens of the United States, and the act of May 8, 1906, omits the provision that all Indians in the Indian Territory shall become citizens of

the United States, and reenacts in effect old section 8 of the act of 1887 by declaring that the provisions with respect to citizenship *shall not apply to any Indians in the Indian Territory.*

Thus we have the act of 1887 granting citizenship to certain Indians and expressly withholding citizenship to the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and others; then the amendment of 1901, without repealing the exceptions as to the Cherokees and others, providing that all Indians in the Indian Territory, and certainly all Indians in that territory who have taken up civilized life apart from their tribes, shall be citizens of the United States, and finally the act of 1906 granting citizenship to certain Indians and expressly providing that it shall not apply to any Indians in the Indian Territory.

We submit that if this legislation is to be taken literally, without any attempt to reconcile it, the most that can be claimed with respect to the Cherokees is that Congress has apparently made them citizens of the United States from March 3, 1901, to May 8, 1906. This result follows if the amendment of 1901, declaring that after the words "civilized life" in section 6 of the old act of 1887 there should be inserted "and every Indian in the Indian Territory," actually conferred citizenship upon the Cherokees, for certainly the act of 1906, after expressly conferring citizenship upon certain classes of Indians, declares "that the provisions of this act shall not extend to any Indians in the Indian Territory."

The only way that these several acts can be harmonized is to construe the act of 1901 as not intended to apply to the Cherokees, but only to such Indians in the Indian Territory not designated by the exception in the act of 1887 and only to such of these Indians as have taken up civilized life apart from their tribes. But even if this act of 1901 be construed as applying to all Indians in the Indian Territory, including the Cherokees, it ought at least to be limited to such Indians, whether Cherokees or others, who have taken up the habits of civilized life and are living apart from their tribes. In either case the appellants here, Brown and Gritts, were not made citizens; first, because they are among the excepted Cherokees, and, second, because it does not appear that they have taken up civilized life apart from their tribe.

THIRD.

If any citizenship was conferred upon full-blood Cherokees, it was only a limited or qualified Federal citizenship and not inconsistent with the continued supervision over the alienation of their lands.

Appellants in this case unduly emphasize the importance of citizenship. In fact, they rest their whole case upon it. Their opinion seems to be that if these Cherokee Indians were citizens of the United States when the act of April 26, 1906, extending the restrictions upon their power to alienate their lands was passed, Congress could not enact any further legislation for their protection in the possession of

their lands. They apparently argue that the conferring of the rights of citizenship upon Indians brings them for the first time within the purview of the Fifth Amendment to the Constitution, and that thereafter, if Congress attempts to restrict them in the disposition of their lands, it has violated the guaranty against the taking of property without due process of law.

The fallacy of this argument is that the fifth amendment is not concerned with citizenship. It declares that "no *person* shall be * * * deprived of life, liberty, or property without due process of law." There is a fundamental difference between persons and citizens, and this is clearly shown by the language of the Fourteenth Amendment. That amendment forbids the States "to make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States;" but as to life, liberty, or property it declares that no State shall "deprive any *person* of life, liberty, or property without due process of law." Indians do not get any new or additional property rights by being made citizens.

The only real question is, What is due process of law with respect to the property of Indians? And this due process of law will be found in the consistent and immemorial attitude of the Government of the United States toward its Indian wards. There is nothing in the acquisition of citizenship of itself which changes that attitude, or which ought to change the national policy. Of course if Congress clearly expresses the purpose of putting an end to its rela-

tion of guardianship and frees itself in clear language from any further obligation in that respect, then a different situation will arise. But so long as Congress continues to exercise its control of Indians, and especially of their property, the courts will uphold its acts. As this court said *In re Heff* (197 U. S., 488, 499):

> It (Congress) may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end.

This attitude of the courts is further shown in the case of *Jones* v. *Meehan* (175 U. S., 1), where, after discussing the relation of Indian tribes to the Government, it was held that certain land reserved to an Indian by an act of Congress was alienable by his heirs after his death, because Congress had made clear its intention to free such land from further restrictions. The court says:

> The inference appears to us to be irresistible that Congress did not intend that there should thenceforth be any general restriction upon the alienation of individual Indians of sections of land reserved to them respectively by a treaty with the United States.

So Congress may partially withdraw its control of the Indians and their affairs. It may, as it did in the allotment act of February 8, 1887 (24 Stat., 388, chap. 119), provide that the Indians who received their allotments under that act shall "have the benefit and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying such Indian within its jurisdiction the equal protection of the law." If it does say this in plain and unmistakable language, it can not thereafter reassert federal control and penalize the sale of liquor within a State to an Indian who had been wholly emancipated from federal laws, both civil and criminal, and made subject only to state laws. This was the decision in the *Heff* case, *supra*, and is as far as it goes.

But in the case at bar, even if these full-blood Cherokee Indians had become citizens of the United States, Congress evinced no purpose to withdraw from them the protection of their property from improvident alienation. The legislation on the subject shows that Congress has intended to keep control of this subject. Before the time limit in the act of 1902 had expired, Congress passed the act of 1906 extending the restrictions imposed in the first statute.

That the grant of citizenship does not itself emancipate the Indian from federal control is shown by the fact that the act of July 1, 1902, under which Brown and Gritts received their allotments, imposed restrictions upon their alienation, although, as appellants claim, they were then citizens of the United

States under the act of 1901. They do not question here the validity of the act of July 1, 1902, because if they did they would not have any lands to contend about. But that very act which divided among the Cherokees tribal property, claimed by appellants to have been theirs by patent to the Cherokee Nation, which conferred a fee-simple title, provided that they should not alienate their homesteads within twenty-one years nor their other lands, whether allotted or inherited, within five years. Now, if Congress was without power to impose conditions as to alienation upon the lands which already belonged to the Cherokee Nation because the individuals to whom the allotments were made were citizens of the United States, then the act of 1902 is unconstitutional, the allotments under it were invalid, and the appellants have no case here to be considered. Nor does it help the matter any to say that the act of July 1, 1902, was ratified by the tribe. In the first place the Indians could not waive any rights they had as citizens, and if Congress was without power to impose restrictions upon the alienation of lands which already belonged to them in fee simple, the restrictions were void. And in the next place the ratification by the Cherokee tribe adds nothing whatever to the validity of the act of Congress, for, as this court has said in the *Intermarried White* cases (203 U. S., 76), this act of July 1, 1902, being ratified by the Indians affected, has been called a "treaty," "but it is only an act of Congress and can have no greater effect." (See also *Thomas* v.

Gay, 169 U. S., 264; *Cherokee Tobacco case*, 7 Wall., 621; *Lone Wolf* v. *Hitchcock*, 187 U. S., 553.)

That Congress may continue to legislate with respect to the disposition of Indian lands, whether held by the tribe or by individual allottees and whether the Indians have become citizens or not, is well established in many cases.

In *Cherokee Nation* v. *Hitchcock* (187 U. S., 294), decided after the passage of the citizenship act of March 3, 1901, under which the appellants claim citizenship, and after the passage of the act of July 1, 1902, under which their lands were allotted, this court in discussing the effect of citizenship upon the congressional control of Indian lands, say:

> There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remained subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation.

In *Wiggan* v. *Conolly* (163 U. S., 56) certain lands allotted to the Ottawa Indians residing in the State of Kansas, under the treaty of July 16, 1862 (12 Stat., 1237), were made inalienable until "the expiration of the period of five years from the date of the ratification of this treaty," when the allottees shall become citizens of the United States. It so happened that they also became citizens of the State of Kansas at the

same time. Esther Wilson, to whom land had been allotted under the treaty and to whom a patent reciting the conditions of the treaty had been delivered on December 1, 1865, was a minor and a recognized enrolled member of the Ottawa tribe. On February 23, 1867, prior to the expiration of the five-year limit upon alienation, but subsequent to the delivery of the patent, another treaty was entered into extending the time when the allottees should become citizens of the United States two years, with the provision that all who desired to become citizens should make a declaration of their intention in a United States district court. The treaty, as afterwards amended and finally ratified on October 4, 1868, provided that adults and heads of families should receive patents in fee simple, "so that they may sell their lands without restriction." The guardian of Esther Wilson, under the order of the probate court of Franklin County, Kans., on October 26, 1872, sold her allotment to John Wiggin, from whom the appellants derived their title. The Supreme Court said (p. 62):

> It does not appear that the allottee in this case was the head of the family, and according to the testimony she was a minor. This treaty of 1867 introduced a new limitation upon the inalienability of lands patented to a minor allottee, that is, the limit of minority, and such limit must be applied to sales, voluntary and involuntary, and cut off the right of a guardian to dispose of the estate. The fact that a patent to this allotment had already been issued did not abridge the right of the

> United States to add, with the consent of the tribe, a new limitation to the power of the individual Indians in respect to alienation. The land and the allottee were both still under the charge and care of the nation and the tribe, and they could agree for further protection, a protection which no individual was at liberty to challenge.

Of course, it will be observed that this case arose prior to the act of March 3, 1871 (16 Stat., 566), when Congress changed its policy and determined thereafter to deal with the Indian tribes by direct legislation instead of by treaty. Since that time (1871) this court has frequently decided that Congress has plenary power over Indian tribes and individuals so long as the tribal relations continue, and may now do by direct legislative enactment anything it could formerly have done by treaty. (*Lone Wolf* v. *Hitchcock*, 187 U. S., 553.)

In *Conley* v. *Ballinger* (216 U. S., 84, 91) is to be found the very latest expression on this subject, and there it is said that even a promise to a tribe rests for its fulfillment "on the good faith of the United States—a good faith that would not be broken by a change believed by Congress to be for the welfare of the Indian."

It follows, therefore, that the case of *Wiggan* v. *Conolly*, just cited, establishes the proposition that without regard to the terms and conditions of a patent from the United States, and *without regard to citizenship*, Congress may extend the period within which the allottee may dispose of his lands.

In the case of *Thomas* v. *Gay* (169 U. S., 264, 274), this language is used:

> The unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organization, may be conceded.

In *United States* v. *Rickert* (188 U. S., 432) the State of South Dakota undertook to tax lands patented to Indian allottees with certain restrictions upon alienation, and the Indians had become citizens not only of the United States, under the General Allotment Act of February 8, 1887, but of the State of South Dakota. The court, speaking through Mr. Justice Harlan, say:

> It is said that the state has conferred upon these Indians the right of suffrage and other rights that ordinarily belong to citizens, and that they ought therefore to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question which the courts can not determine. We can only deal with the case as it exists under the legislation of Congress (p. 445).

It is to be noted that while the court here declares that it is for Congress to determine when these Indians shall "assume the responsibilities attaching to citizenship," Congress had already declared them to be citizens of the United States, thus showing that

the citizenship conferred was qualified in character and not inconsistent with a continued supervision over their lands.

A number of Federal courts have considered the question as to the effect of citizenship upon the further right of Congress to impose restrictions upon the alienation of their lands. In *United States* v. *Flournoy, etc., Co.* (69 Fed., 886, 891), the claim was made that as the Indian to whom the land had been allotted had become a citizen of the United States, he ceased to be a ward of the Government, and that citizenship was inconsistent with the prohibition upon the alienation of his lands. But the court said:

> The right to alienate lands is denied to minors, and yet, during their minority, they may be citizens of the United States, with all the privileges and rights conferred thereby.

In *Hitchcock* v. *United States, ex rel. Big Boy* (22 App. D. C., 275), the Supreme Court of the District of Columbia in discussing the right of the Government to supervise the disposition of the proceeds derived from the sale of allotted lands, said:

> It is a daily experience that in the matter of wills, marriage settlements, deeds of trust, and other similar arrangements, property is tied up and the right of alienation and disposal of it is restricted; and yet it has never been supposed that thereby the right of citizenship of the grantor or beneficiary is impaired. The provisions made in the present and other similar cases for those who are or have been wards of the Government of the United States, are

> analogous to ordinary trusts wherein it is sought by restricting the right of disposal to guard the beneficiary against the result of his own improvidence; and we fail to find in either any impairment of the right of citizenship.

In *Beck* v. *Flournoy, etc., Co.* (65 Fed., 30) the Circuit Court of Appeals for the Eighth Circuit, speaking through Judge Thayer, held that although the act of 1887 made general allotments to Indians in severalty and granted them citizenship in the United States, nevertheless it was within the power of Congress to put restrictions upon the alienation of their lands, and that citizenship was not inconsistent with a limited right to dispose of their property.

In *Ross* v. *Eells* (56 Fed., 855) the United States Circuit Court sustained the claim of the plaintiffs that members of the Puyallup tribe in the State of Washington to whom allotments had been made, and who had become citizens of the United States and also of the State when admitted into the Union, had been emancipated from the control of Congress; but upon appeal to the Circuit Court of Appeals (64 Fed., 417), the decision of the lower court was reversed, the appellate court holding that:

> The Act of February 8, 1887 which confers citizenship, clearly does not emancipate the Indians from all control or abolish the reservations.

This case was carried on appeal to the Supreme Court of the United States, and the appeal was here dismissed. (163 U. S., 702.)

In *United States* v. *Thurston County, Nebr.* (143 Fed., 287, 288), the Circuit Court of Appeals held that the fact that Indian allottees had become citizens of the United States and of the State of Nebraska did not in anywise affect the power or duty of Congress to protect their property interests. The court said:

> Their civil and political status, however, does not condition the power, authority, or duty of the United States to exert its powers of government to control their property.

There is a fundamental difference between property rights and personal rights. In the *Heff* case (197 U. S., 488) this court was considering the application of criminal laws to the Indians when citizens of a State, and held that the United States having made the Indian in that case a citizen of the United States, and the Indian having become a citizen of the State in which he lived and made by act of Congress subject to the civil and criminal laws of the State, he was outside the reach of federal police regulations as to the sale of liquor to him.

So in *United States* v. *Celestine* (215 U. S., 278), even though the Indian there had been made a citizen of the United States under the general allotment act of February 8, 1887, yet since he was not made subject to the civil and criminal laws of the State or Territory where he resided, but was a citizen only by virtue of the second sentence of the act of 1887, which declared "that such Indians shall be citizens of the United States and entitled to all the rights, privileges,

and immunities of such citizens," nevertheless he continued to be under the jurisdiction of the United States and was subject to the act of March 3, 1885 (23 Stat., 385), which provided that Indians committing certain crimes against the person or property of other Indians or other persons within the boundaries of any State in the United States and within the limits of an Indian reservation, should be subject to the same laws and penalties and tried in the same courts as were all other persons committing any of such crimes within the exclusive jurisdiction of the United States. In other words, this court held, distinguishing the *Heff* case, that where the United States has not emancipated the Indian from federal control and subjected him to the civil and criminal laws of the State or Territory in which he resides, he continues subject to federal jurisdiction notwithstanding the fact that he may in express terms have been made a citizen of the United States.

Under all considerations there is this difference between the attitude of the Government as to the property rights of the Indians on the one hand and their subjection to local criminal laws on the other—that with respect to property rights the Federal Government may still protect the Indians and limit their power to dispose of their lands, although it may relinquish control of them in the matter of crimes against local authority. It is the same distinction that runs through the treatment by the States of minors. A child at an early

age may be subjected to the criminal laws and yet not have the right to dispose of his property. So in the treatment of the Indians it is a natural policy for the Government to subject them as far as possible to local laws and courts in the States or Territories with respect to crimes committed by them, and nevertheless withhold its consent to their subjection to the local laws with respect to the disposition of property. Yet in the *Celestine* case, even though there was there involved a criminal offense, and even though the Indian was a citizen of the Territory in which the offense was alleged to have been committed, yet, since it did not clearly appear that Congress had intended that he should be subject to the criminal laws of the Territory, which had subsequently become a State, the court held that the Indian was subject only to the federal jurisdiction.

In *United States* v. *Sutton* (215 U. S., 291) an indictment was found under the same statute as that involved in the *Heff* case, except that it was under a clause making it unlawful to introduce intoxicating liquors into the Indian country or upon any Indian allotment while the same should remain inalienable. The court held that indictment good, notwithstanding the fact that the Indian was a citizen of the United States under the act of 1887 and that the allotment was within the State of Washington, but because Congress had retained such control over the Indian's lands as to take them out of the jurisdiction of the

State and keep them within the jurisdiction of Congress. It is to be observed, further, that this act of 1897 was passed ten years after the lands had been allotted and after the Indian had been made a citizen.

The opinions in these three cases—*In re Heff*, *United States* v. *Celestine*, and *United States* v. *Sutton*—were written by Mr. Justice Brewer, and they not only disclose an intimate grasp of the subject but most convincingly support the proposition that even after an Indian has become a citizen of the United States and after his lands have been allotted to him in severalty Congress still possesses plenary power to legislate with respect to him and his lands, unless by its own act it has relinquished such power.

FOURTH.

Congress never intended by the grant of citizenship to surrender its power to protect these Cherokee Indians, and especially to protect their property interests, for it has expressly continued their tribal government.

As this court said in the *Heff* case (197 U. S., 488), and as it has said in many other cases, the intention of Congress to release federal control of the Indians and their affairs must be clearly expressed before the courts will assume the fact to be accomplished. Now, not only is there no indication in the present instance that Congress has intended to relieve itself of further obligation in the protection of the lands of full-blood Cherokee Indians, but it expressly and affirmatively appears that Congress intended, notwithstanding the grant to them of federal citizenship, to retain the

power of protecting their property interests. In the very act which, it is claimed, made them citizens, to wit, the act of February 8, 1887, as amended March 3, 1901 (24 Stat., 388; 31 Stat., 1447), it is declared that such grant of citizenship shall not in any manner impair or otherwise affect the right of "any such Indian to tribal or other property."

In fact, on the very day, to wit, March 3, 1901, when, appellants claim, they were made citizens by the amendment to the general allotment act of 1887, *Congress treated them as Indians and as members of an Indian tribe.* It provided that "no act, ordinance, or resolution of the Creek or Cherokee tribes, except resolutions of adjournment, shall be of any validity until approved by the President of the United States." (31 Stat., 1077.) Certainly, if Congress intended to make these full-blood Cherokees citizens of the United States, with all the privileges and immunities of such citizens and with full power to alienate their lands, it is remarkable that on the same day when they were invested with such citizenship Congress was legislating with respect to their tribal government and providing how its acts should be approved.

Further, if Congress intended by the act of March 3, 1901, to make the Cherokees citizens, with full power to alienate their lands, it is incredible that Congress should, a year later, to wit, on July 1, 1902, provide for an allotment of a portion of their lands in severalty, impose by that very act restrictions upon their right to alienate the lands, and then take a vote of the Indian tribe upon the subject.

The continuance of tribal government is utterly inconsistent with full citizenship on the part of the members of the tribe, and for even stronger reasons it is inconsistent with a withdrawal on the part of Congress of further control of Indian property. Now, the fact is well established that the tribal government of the Cherokee nation was, in 1901, when citizenship is claimed to have been granted, in 1902, when the lands here involved were allotted, in 1906, when the restrictions upon the alienation of such lands were extended, and is to-day, in existence and recognized by the political department of the United States.

The act of July 1, 1902, itself provided that the tribal government of the Cherokees should extend until March 4, 1906; and when that date arrived, it being discovered that the enrollment of the Cherokee Indians had not been completed, and that a large part of the tribal lands was still unallotted, Congress, by a joint resolution approved March 2, 1906 (34 Stat., 822), continued the tribal government in the following language:

> The tribal existence and present tribal government of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until the property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law.

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Then, by the act of April 26, 1906, which extended the restrictions upon alienation, the tribal government of the Cherokees was further continued "until otherwise provided by law," and no act of Congress has since been passed abolishing such tribal government. At the present time there are still lands of the Cherokee Nation unallotted and tribal funds undistributed, for which lands patents must be issued and signed by the principal chief of the Cherokee Nation, as provided in section 58 of the act of July 1, 1902.

The appellants claim to be citizens, not only of the United States, but of the State of Oklahoma. In view of this contention, the fact ought to be noted that the State of Oklahoma was not admitted into the Union until November 16, 1907, whereas the act extending the period of restrictions, the validity of which is now in question, was passed April 26, 1906, and this suit was brought on March 16, 1907.

But the enabling act admitting Oklahoma into the Union as a State (34 Stat., 267), so far from disclosing an intention on the part of Congress to emancipate the Cherokee Indians or their lands from governmental control, expressly reserves such control in the Federal Government. Section 1 provided:

> That nothing contained in the State constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished), or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands,

> property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed (p. 267).

And the third clause of section 3 of said act provided—

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian tribe or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States (p. 270).

In *Draper* v. *United States* (164 U. S., 240) this court considered similar language in the Montana enabling act. The Montana act provided—

> That the people inhabiting the said proposed State of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States (p. 244).

It is obvious that the clause of the Oklahoma act, "shall be and remain subject to the jurisdiction, disposal, and control of the United States," is the equivalent of the following in the Montana act: "shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Now, in the *Draper* case it was contended that the clause about the "absolute jurisdiction and control of the Congress of the United States" over the Indian lands forbade any state jurisdiction upon those lands—even to try a negro for murder of another negro thereon; and the basis of the argument was that otherwise this clause about absolute jurisdiction and control of the Congress added nothing to what preceded in the statute. Mr. Justice White, in the opinion, however, cited in answer the act of February 8, 1887, and other laws under which lands were to be allotted to the Indians in severalty and the allottees might become citizens and even personally subject to state laws; and he then said—

> From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the power of the State to frus-

> trate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation, but which had become extinct by allotment in severalty, and in which contingency the Indians themselves would have passed under the authority and control of the State (p. 246).

No statement could more clearly show that it does not lie with the State to regulate the matter of alienation of allotted lands.

FIFTH.

Treating these full-blood Cherokees as incompetent citizens of a Territory, Congress had power to designate them as a class who need its special protection in the disposition of their property.

Even if it be admitted that these Cherokee Indians were made citizens of the United States and of the Territory of Oklahoma, in which they resided at the time this suit was brought, it is clear that Congress had power in its authority over the people of the Territory to treat them as a class not sufficiently competent to alienate or encumber their lands without the protection of the Government. Looking upon them not as Indians, but as dependent persons, unable to guard their own interests in dealing with shrewder and thriftier people who dwelt near them or among them, it was not only within the power but it was the duty of Congress to prevent the wasteful disposition of their lands.

The inhabitants of the District of Columbia are citizens of the United States and have "the rights,

privileges, and immunities of such citizens," but they are not citizens of a state or under state regulations. Congress may legislate with respect to them and fix the terms upon which minors or other incompetents may alienate their property. The instances of analagous restrictions upon infants and deficients are abundant and familiar. At common law we have the disability of infants and the incapacity of the idiotic and insane; the voidableness, at least, of drunkards' contracts; and even the chancery rules undoing alienations by expectant heirs, unless for ample consideration. (1 Page on Contracts, 1905, secs. 236–238; *Jenkins* v. *Pye*, 12 Peters, 241–255, 258.)

In some States neither males nor females under 21 can dispose of their personal property by will. No one will contend that the legislature is without power to extend the period of infancy from 21 years to 22 or later, or that such extension could not affect an infant's power to deal with previously acquired property, and yet that question is identical in principle with the one here prevented as to whether a prolongation of the restraints upon the alienation of their allotments by full-blood Indians could affect allotments received before the time when the restraints were extended.

It would seem unnecessary to urge that a classification of full-blood Cherokee Indians as incompetent for a prescribed period to manage their most important and indispensable property, to wit, their land, is not so arbitrary or unreasonable as to contravene the fifth amendment. Of the character and condition

of the full bloods in this case, the Court of Claims found that "they are uneducated and unable to speak the English language and have never before owned any alienable lands and, without governmental supervision, are incompetent to represent and protect themselves in the sale or leasing of their allotted lands" (14 Finding, Rec., 28).

Even white persons who have never been under the guardianship of the United States or the State in which they live, if incompetent either as a class or as individuals, may be placed under the care and supervision of a trustee, and that by a special act of the legislature of the State where such class or individuals reside. In *Rice* v. *Parkman* (16 Mass., 326), which has been extensively quoted by Judge Cooley in his work on Constitutional Limitations (pp. 117, 118), there was a statute already in force which granted to the courts the authority to order the sale of the lands of minors. Notwithstanding this fact, however, the legislature of the State passed a special statute empowering the father of certain minors, as guardian for them, to sell their lands and put the proceeds out at interest for their benefit. The validity of the statute being challenged, it was upheld, and the court said, among other things:

> This power must rest in the legislature in this commonwealth; that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.

Judge Cooley also quotes a paragraph from the opinion in the case of *Cochran* v. *Van Surlay* (20 Wend., 365, 373), to the following effect:

> A similar statute was sustained by the Court for the Correction of Errors in New York. "It is clearly," says the Chancellor, "within the powers of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the *superintendence, disposition, and management of the property and effects* of infants, lunatics, *and other persons who are incapable of managing their own affairs.*"

CONCLUSION.

The act chiefly complained of in this case, which extended the period of restrictions upon the alienation of the lands of full-blood Cherokees from five to twenty-five years on their surplus lands, and from twenty-one to twenty-five years on their homesteads, was passed solely in the interest of and for the benefit of the Indians. The United States has no pecuniary interest in the matter whatever, except as Congress may foresee that if these wards of the Government are permitted to dissipate their property they may once more be entirely dependent upon the bounty of their guardian.

This act of Congress takes no property from any Indian. As this court said, in speaking of similar legislation, in *Cherokee Nation* v. *Hitchcock* (187 U. S., 294), "There is no question in this case as to the taking of property." On the contrary, the sole purpose of this legislation is to make the Indians

secure in the possession of their property. It takes nothing from them, but, on the contrary, is designed merely to insure their keeping what they have.

This act of April 26, 1906, was passed, as the court below found from the testimony (Rec., 28), because many of the full blooded Cherokee Indians "had been induced by designing persons to execute deeds of their allotted lands * * * at grossly inadequate compensation;" and this unfortunate situation is further disclosed by the fact that the United States has brought, on behalf of such Indians, suits to set aside deeds, contracts, and mortgages embracing more than twenty-five thousand transactions. (Rec., 28).

The allotments provided for in the act under which the appellants secured their lands are still being made, and yet, while Congress is continuing to deal with these Indians in their tribal relations and is continuing to parcel their lands among them, the claim is made that Congress is without power to extend restrictions upon the alienation of such lands.

In the last analysis the contention of counsel for the appellants is that these full-blood Cherokees are in precisely the same position as competent white citizens who have received a fee-simple title to real estate. If that be true, then the whole policy of the Government in its dealings with the Indians from the time when the first statute, in 1790, forbidding the alienation of their lands was passed, has proceeded on an indefensible theory.

We submit that there are no inducements in this case to justify a departure from that policy and, least of all, to incline the court to interfere with the plan adopted by Congress. If there is doubt as to the wisdom of that plan, the objection should be addressed to Congress; and if Congress is doubtful about it, the legislation should be reconsidered or repealed.

Of more importance, however, than any other consideration which should induce to the judicial support of this legislation is the fact that the Cherokees themselves have intervened in this case for the protection of their own citizens and desire that the act passed in their interest and for their benefit shall be sustained.

The judgment of the Court of Claims should be affirmed and the petition dismissed.

WADE H. ELLIS,
HENRY E. COLTON,
Special Assistants to the Attorney-General.

NOVEMBER, 1910.

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MUSKRAT *v.* UNITED STATES.

BROWN AND GRITTS *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 330, 331. Argued November 30 and December 1, 2, 1910.—Decided January 23, 1911.

The rule laid down in *Heyburn's Case*, 2 Dall. 409, that neither the legislative nor the executive branch of the Government of the United States can assign to the judicial branch any duties other than those that are properly judicial, to be performed in a judicial manner, applied; and *held*, that it is beyond the power of Congress to provide for a suit of this nature to be brought in the Court of

Claims with an appeal to this court to test the constitutionality of prior acts of Congress, such a suit not being a case or controversy within the meaning of the Constitution.

From its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.

Under the Constitution of the United States the exercise of judicial power is limited to cases and controversies.

A case or controversy, in order that the judicial power of the United States may be exercised thereon, implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication. *Chisholm* v. *Georgia*, 2 Dall. 431.

This court has no veto power on legislation enacted by Congress; and its right to declare an act of Congress unconstitutional can only be exercised when a proper case between opposing parties is submitted for determination. *Marbury* v. *Madison*, 1 Cranch, 137.

The determination by the Court of Claims, and on appeal by this court, of the constitutional validity of an act of Congress in a suit brought by authority of a subsequent act of Congress clothing such courts with jurisdiction for the avowed purpose of settling such question with provision for payment of expenses of the suit in certain contingencies out of funds in the Treasury of the United States, is not within the appellate jurisdiction conferred by the Constitution upon this court; such a suit is not a case or controversy to which the judicial power extends, nor would such a judgment conclude private parties in actual litigation.

That part of the act of March 1, 1907, c. 2285, 34 Stat. 1015, 1028, which requires of this court action in its nature not judicial within the meaning of the Constitution, exceeds the limitation of legislative authority and is unconstitutional, and the suits brought thereunder are dismissed for want of jurisdiction.

This court cannot be required to decide cases over which it has not jurisdiction because other cases are pending involving the same point of law; to do so would require it to give opinions in the nature of advice concerning legislative action.

An act of Congress, conferring jurisdiction on the Court of Claims and on this court on appeal, testing the constitutionality of prior acts of Congress will not be sustained as to the jurisdiction of the Court of Claims alone if it cannot be also sustained as to this court.

44 Court of Claims, 137, reversed with directions to dismiss the suit.

THE facts, which involve the constitutionality and con-

struction of certain acts of Congress relating to the distribution and allotment of lands and funds of the Cherokee Indians, are stated in the opinion.

Mr. John J. Hemphill, Mr. William H. Robeson and *Mr. Daniel B. Henderson*, with whom *Mr. Frank J. Boudinot* was on the brief, for appellants.

Mr. Wade H. Ellis, Special Assistant to the Attorney General, with whom *Mr. Henry E. Colton*, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. W. W. Hastings for the Cherokee Nation.

Mr. S. T. Bledsoe and *Mr. Evans Browne* submitted a brief, by leave of the court, as *amici curiæ*, on behalf of certain full blood Choctaw and Chickasaw allottees.

MR. JUSTICE DAY delivered the opinion of the court.

These cases arise under an act of Congress undertaking to confer jurisdiction upon the Court of Claims, and upon this court on appeal, to determine the validity of certain acts of Congress hereinafter referred to.

Case No. 330 was brought by David Muskrat and J. Henry Dick in their own behalf and in behalf of others in a like situation to determine the constitutional validity of the act of Congress of April 26, 1906, c. 1876, 34 Stat. 137, as amended by the act of June 21, 1906, c. 3504, 34 Stat. 325 *et seq.*, and to have the same declared invalid in so far as the same undertook to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled on September 1, 1902, in accordance with the act of Congress passed July 1, 1902, c. 1375, 32 Stat. 716–720–721. The

acts subsequent to that of July 1, 1902, have the effect to increase the number of persons entitled to participate in the division of the Cherokee lands and funds, by permitting the enrollment of children who were minors living on March 4, 1906, whose parents had theretofore been enrolled as members of the Cherokee tribe or had applications pending for that purpose.

Case No. 331 was brought by Brown and Gritts on their own behalf and on behalf of other Cherokee citizens having a like interest in the property allotted under the act of July 1, 1902, c. 1368, 32 Stat. 710. Under this act, Brown and Gritts received allotments. The subsequent act of March 11, 1904, c. 505, 33 Stat. 65, empowered the Secretary of the Interior to grant rights of way for pipe lines over lands allotted to Indians under certain regulations. Another act, that of April 26, 1906, c. 1876, 34 Stat. 137, purported to extend to a period of twenty-five years the time within which full-blooded Indians of the Cherokee, Choctaw, Chickasaw, Creek and Seminole tribes were forbidden to alienate, sell, dispose of or encumber certain of their lands.

The object of the petition of Brown and Gritts was to have the subsequent legislation of 1904 and 1906 declared to be unconstitutional and void, and to have the lands allotted to them under the original act of July 1, 1902, adjudged to be theirs free from restraints upon the rights to sell and convey the same. From this statement it is apparent that the purpose of the proceedings instituted in the Court of Claims and now appealed to this court is to restrain the enforcement of such legislation subsequent to the act of July 1, 1902, upon the ground that the same is unconstitutional and void. The Court of Claims sustained the validity of the acts and dismissed the petitions. 44 C. Cls. 137, 283.

These proceedings were begun under the supposed authority of an act of Congress passed March 1, 1907 (a part

of the Indian appropriation bill), c. 2285, 34 Stat. 1015, 1028. As that legislation is important in this connection so much of the act as authorized the beginning of these suits is here inserted in full:

"That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled 'An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of townsites therein, and for other purposes,' and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

"And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

"The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney General, who is hereby charged with the defense of said suits.

"Upon the rendition of final judgment by the Court of Claims or the Supreme Court of the United States denying the validity of any portion of the said acts authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two."

This act is the authority for the maintenance of these two suits.

The first question in these cases, as in others, involves the jurisdiction of this court to entertain the proceeding, and that depends upon whether the jurisdiction conferred is within the power of Congress, having in view the limitations of the judicial power as established by the Constitution of the United States.

Section 1 of Article III of the Constitution provides:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of the same Article provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party; to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects."

It will serve to elucidate the nature and extent of the judicial power thus conferred by the Constitution to note certain instances in which this court has had occasion to examine and define the same. As early as 1792, an act of Congress, March 23, 1792, c. 11, 1 Stat. 243, was brought to the attention of this court, which undertook to provide for the settlement of claims of widows and orphans barred by the limitations theretofore established regulating claims to invalid pensions. The act was not construed by this court, but came under consideration before the then Chief Justice and another Justice of this court and the District Judge, and their conclusions are given in the margin of the report of *Hayburn's Case*, 2 Dall. 409. The act undertook to devolve upon the Circuit Court of the United States the duty of examining proofs, of determining what amount of the monthly pay would be equivalent to the disability ascertained, and to certify the same to the Secretary of War, who was to place the names of the applicants on the pension list of the United States in conformity thereto, unless he had cause to suspect imposition or mistake, in which event he might withhold the name of the applicant and report the same to Congress.

In the note to the report of the case in 2 Dall. it appeared that Chief Justice Jay, Mr. Justice Cushing and District Judge Duane unanimously agreed:

"That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

"That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner.

"That the duties assigned to the Circuit Courts, by this act, are not of that description, and that the act itself does not appear to contemplate them as such; inasmuch as

it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary of War, and then to the revision of the legislature; whereas by the Constitution, neither the Secretary of War, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court."

A further history of the case—and of another brought under the same act but unreported—will be found in *United States* v. *Ferreira*, 13 How. 40, in which the opinion of the court was by the Chief Justice, and the note by him on page 52 was inserted by order of the court. Concluding that note it was said:

"In the early days of the Government, the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress cannot enlarge it. In all other cases its power must be appellate."

In the *Ferreira case* this court determined the effect of proceedings under an act of Congress, authorizing the District Judge of the United States for the Northern District of Florida to receive and adjudicate claims for losses for which this Government was responsible under the treaty of 1819 between the United States and Spain; decisions in favor of claimants, together with evidence given in connection therewith, to be reported to the Secretary of the Treasury, who, being satisfied that the same were just and equitable and within the treaty, was to pay the amount thereof. It was held that an award of the Dis-

trict Judge under that act was not the judgment of a court and did not afford a basis of appeal to this court.

In 1793, by direction of the President, Secretary of State Jefferson addressed to the Justices of the Supreme Court a communication soliciting their views upon the question whether their advice to the executive would be available in the solution of important questions of the construction of treaties, laws of nations and laws of the land, which the Secretary said were often presented under circumstances which "*do not give a cognizance of them to the tribunals of the country.*" The answer to the question was postponed until the subsequent sitting of the Supreme Court, when Chief Justice Jay and his associates answered to President Washington that in consideration of the lines of separation drawn by the Constitution between the three departments of government, and being judges of a court of last resort, afforded strong arguments against the propriety of extrajudicially deciding the questions alluded to, and expressing the view that the power given by the Constitution to the President of calling on heads of departments for opinions "seems to have been purposely, as well as expressly, united to the executive departments." Correspondence & Public Papers of John Jay, vol. 3, p. 486.

The subject underwent a complete examination in the case of *Gordon* v. *United States*, reported in an appendix to 117 U. S. 697, in which the opinion of Mr. Chief Justice Taney, prepared by him and placed in the hands of the clerk, is published in full. It is said to have been his last judicial utterance, and the whole subject of the nature and extent of the judicial power conferred by the Constitution is treated with great learning and fullness. In that case an act of Congress was held invalid which undertook to confer jurisdiction upon the Court of Claims and thence by appeal to this court, the judgment, however, not to be paid until an appropriation had been estimated therefor

by the Secretary of the Treasury; and, as was said by the Chief Justice, the result was that neither court could enforce its judgment by any process, and whether it was to be paid or not depended on the future action of the Secretary of the Treasury and of Congress. "The Supreme Court," says the Chief Justice, "does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution, and represents one of the three great divisions of power in the Government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other."

Concluding his discussion of the subject, the Chief Justice said, after treating of the powers of the different branches of the Government, and laying emphasis upon the independence of the judicial power as established under our Constitution, p. 706: "These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers entrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution."

At the last term of the court, in the case of *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 215 U. S. 216, this court declined to take jurisdiction of a case which undertook to extend its appellate power to the consideration of a case in which there was no judgment in the court below. In that case former cases were reviewed

by Mr. Chief Justice Fuller, who spoke for the court, and the requirement that this court adhere strictly to the jurisdiction, original and appellate, conferred upon it by the Constitution, was emphasized and enforced. It is therefore apparent that from its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.

It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and with the aid of appropriate legislation upon the inferior courts of the United States. "Judicial power," says Mr. Justice Miller in his work on the Constitution, "is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Miller on the Constitution, 314.

As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to "cases" and "controversies." Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

What, then, does the Constitution mean in conferring this judicial power with the right to determine "cases" and "controversies"? A "case" was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury* v. *Madison*, 1 Cranch, 137, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term "controversy"? That question was dealt with by Mr. Justice Field, at the circuit, in the case of *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 255. Of these terms that learned Justice said:

"The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less compre-

hensive than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia*, 2 Dall. 431, 432; 1 Tuck. Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

The power being thus limited to require an application of the judicial power to cases and controversies, is the act which undertook to authorize the present suits to determine the constitutional validity of certain legislation within the constitutional authority of the court? This inquiry in the case before us includes the broader question, When may this court, in the exercise of the judicial power, pass upon the constitutional validity of an act of Congress? That question has been settled from the early history of the court, the leading case on the subject being *Marbury* v. *Madison*, *supra*.

In that case Chief Justice Marshall, who spoke for the court, was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprung from the requirement that the court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents

of the people, acting under authority of the Constitution, should enforce the Constitution as the supreme law of the land. The Chief Justice demonstrated, in a manner which has been regarded as settling the question, that with the choice thus given between a constitutional requirement and a conflicting statutory enactment, the plain duty of the court was to follow and enforce the Constitution as the supreme law established by the people. And the court recognized, in *Marbury* v. *Madison* and subsequent cases, that the exercise of this great power could only be invoked in cases which came regularly before the courts for determination, for, said the Chief Justice, in *Osborn* v. *Bank of United States*, 9 Wheat. 819, speaking of the third Article of the Constitution conferring judicial power:

"This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

Again, in the case of *Cohens* v. *Virginia*, 6 Wheat. 264, Chief Justice Marshall, amplifying and reasserting the doctrine of *Marbury* v. *Madison*, recognized the limitations upon the right of this court to declare an act of Congress unconstitutional, and granting that there might be instances of its violation which could not be brought within the jurisdiction of the courts, and referring to a grant by a State of a patent of nobility as a case of that class, and conceding that the court would have no power to annul such a grant, said, p. 405:

"This may be very true; but by no means justifies the inference drawn from it. The article does not extend the

judicial power to every violation of the Constitution which may possibly take place, but to 'a case in law or equity' in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the Constitution of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be 'a *case* in law or equity' arising under the Constitution, to which the judicial power does not extend."

See also in this connection *Chicago & Grand Trunk Railway Company* v. *Wellman*, 143 U. S. 339. On page 345 of the opinion in that case the result of the previous decisions of this court was summarized in these apposite words by Mr. Justice Brewer, who spoke for the court:

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a

party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

Applying the principles thus long settled by the decisions of this court to the act of Congress undertaking to confer jurisdiction in this case, we find that William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, and David Muskrat and J. Henry Dick, for themselves and representatives of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, are authorized and empowered to institute suits in the Court of Claims to determine the validity of acts of Congress passed since the act of July 1, 1902, in so far as the same attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in the said act of July 1, 1902.

The jurisdiction was given for that purpose first to the Court of Claims and then upon appeal to this court. That is, the object and purpose of the suit is wholly comprised in the determination of the constitutional validity of certain acts of Congress; and furthermore, in the last paragraph of the section, should a judgment be rendered in the Court of Claims or this court, denying the constitutional validity of such acts, then the amount of compensation to be paid to attorneys employed for the purpose of testing the constitutionality of the law is to be paid out of funds in the Treasury of the United States belonging to the beneficiaries, the act having previously provided that the United States should be made a party and the Attorney General be charged with the defense of the suits.

It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful char-

acter of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution.

Nor can it make any difference that the petitioners had brought suits in the Supreme Court of the District of Columbia to enjoin the Secretary of the Interior from carrying into effect the legislation subsequent to the act of July 1, 1902, which suits were pending when the jurisdictional act here involved was passed. The latter act must depend upon its own terms and be judged by the authority which it undertakes to confer. If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this court, instead of keeping within the limits of judicial power and deciding cases or controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning.

The questions involved in this proceeding as to the validity of the legislation may arise in suits between individuals, and when they do and are properly brought before this court for consideration they, of course, must be determined in the exercise of its judicial functions. For

the reasons we have stated, we are constrained to hold that these actions present no justiciable controversy within the authority of the court, acting within the limitations of the Constitution under which it was created. As Congress, in passing this act as a part of the plan involved, evidently intended to provide a review of the judgment of the Court of Claims in this court, as the constitutionality of important legislation is concerned, we think the act cannot be held to intend to confer jurisdiction on that court separately considered. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565; *Employers' Liability Cases*, 207 U. S. 463.

The judgments will be reversed and the cases remanded to the Court of Claims, with directions to dismiss the petitions for want of jurisdiction.